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ABSTRACT

This report examines the effects that the ratification of the Equal Rights Amendment will have on laws concerning women. The amendment's impacts on divorced, married, and employed women, on women in the military and in school, and on women dependent on pensions, insurance, and social security are all analyzed. A discussion of the Constitutional ramifications of the amendment on the States and courts is also included. (APM)

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ED210372

The Equal Rights Amendment: Guaranteeing Equal Rights for Women Under The Constitution

United States Commission on Civil Rights
Clearinghouse Publication 68

June 1981

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Introduction

The United States Commission on Civil Rights first endorsed the proposed Federal Equal Rights Amendment in 1973,[1] soon after it was adopted by the United States Congress and reported to the individual States for ratification.[2] The language of the Equal Rights Amendment[3] expresses the basic principle that government at all levels should treat women and men as individuals having equal rights under law and provides for the implementation of this principle:

> Sec. 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Sec. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> Sec. 3. This amendment shall take effect two years after the date of ratification.

The Commission reaffirmed its support for the Equal Rights Amendment in 1978 when Chairman Arthur Flemming and Commissioner Frankie Freeman testified in support of extending the period of time in which ratification could be accomplished.[4] In December 1978 the Commission published its *Statement on the Equal Rights Amendment.* [5] In that statement, the Commission documented the continuing need for the Equal Rights Amendment and the experience of the 16 States that already have added equal rights provisions to their State constitutions.[6] On the basis of its study, the Commission concluded that

> attainment of full, equal rights for women and men requires ratification of the proposed amendment. The need for the ERA is at least as great today as it was when Congress proposed the amendment to the States in 1972. Measured by any standard, gender lines have not been erased, and the history of unequal treatment of men and women has not been adequately redressed under existing law. Moreover, as a result of experiences under State constitutional amendments virtually identical to the proposed Federal amendment, it is even clearer now than it was in 1972 that the ERA is the appropriate remedial action to address this inequality and assure women and men equal justice before the law.[7]

In the 2 years since the *Statement* was issued, the Commission has viewed with increasing concern the gap between reality and myth concerning the meaning of the Equal Rights Amendment. The Commission believes that this gap has significantly interfered with efforts to add the amendment to our Federal Constitution. The gap is illustrated by a recent independent statewide poll sponsored by the *Salt Lake Tribune,* [8] asking Utah voters whether they approved of the following language: "Equality of rights under the law shall not be abridged by the United States or by any state on account of sex." The language was favored by nearly a two-to-one margin. Yet when asked whether they favor or oppose Utah's passing the "Equal Rights Amendment," many of the same voters who favored the equal rights language stated their opposition to ratifying the ERA.[9] Since the language quoted above is drawn directly from the text of the

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[1] The full text of this endorsement is reproduced as Appendix A.

[2] The ERA was approved by Congress and sent to the States for ratification on Mar. 22, 1972, 49 years after it was first introduced. This legislative history is reviewed in U.S., Congress, Senate Judiciary Subcommittee on the Constitution, *Report Pursuant to S. Res. 170,* 95th Cong., 1st sess., 1978, pp. 31–35.

[3] H.R.J. Res. 208, 92d Cong., 1st sess., 86 Stat. 1523 (1971).

[4] U.S., Congress, *Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings On H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the House Comm. on the Judiciary,* 95th Cong., 1st & 2d sess., 1977–78 (statement of Arthur S. Flemming and Frankie M. Freeman), p. 334.

[5] U.S., Commission on Civil Rights, *Statement on the Equal Rights Amendment,* (1978) (hereafter cited as *1978 ERA Statement).*

[6] Ibid. Fourteen States have added equal rights provisions to their constitutions since 1970: Alaska, Alas. Const. Art. 1, §3 (1972); Colorado, Colo. Const. Art. 2, §29 (1972); Connecticut, Conn. Const. Art. 1, §20 (1974); Hawaii, Hawaii Const. Art. 1, §21 (1972); Illinois, Ill. Const. Art. 1, §18 (1971); Maryland, Md. Const. Art. 46 (1972); Massachusetts, Mass. Const. Part I, Art. 1 (1976); Montana, Mont. Const. Art. 2, §4 (1973); New Hampshire, N.H. Const. Part I, Art. 2 (1974); New Mexico, N.M. Const. Art. 2, §18 (1973); Pennsylvania, Pa. Const. Art. 1, §28 (1971); Texas, Tex. Const. Art. 1, §3a (1972); Virginia, Va. Const. Art. 1, §11 (1971); and Washington, Wash. Const. Art. 31, §1 (1972). The language of the Colorado, Hawaii, Maryland, Massachusetts, New Hampshire, New Mexico, Pennsylvania, Texas, and Washington provisions closely resembles that of the proposed Federal Equal Rights Amendment. Utah and Wyoming adopted constitutional provisions regarding sex equality near the end of the 19th century. Utah Const. Art. 4, §1 (1896); Wyo. Const. Art. 1, §§2, 3, Art. 6, §1 (1890).

[7] *1978 ERA Statement,* p. 4.

[8] "Voters Opposed to ERA, But Support Its Concept," *Salt Lake Tribune,* May 11, 1980 p. A–1.

[9] Ibid.

proposed Equal Rights Amendment, such conflicting responses to the two questions are not easy to reconcile.

The gap also is seen in other independent polls, conducted nationwide, consistently showing majority support for the Equal Rights Amendment.[10] But nationally, as in Utah, the support for the *principle* of equality embodied in the Equal Rights Amendment is even stronger than support for the amendment itself,[11] indicating that many persons have not accepted the fact that the ERA is the most effective way to secure equal rights under law for women and men. Moreover, even where broad-based support for the ERA is documented, it is ignored by State legislatures that refuse to ratify the amendment.[12]

Thirty-five States, representing 72 percent of the United States population, have ratified the proposed Equal Rights Amendment, approving it as part of the Federal Constitution.[13] However, the ratification process is stalled 3 States short of the total number of 38 needed by June 30, 1982, the time set by Congress, after extending the original ratification period, as the final date for approval of the amendment.[14] The 15 States that have failed to ratify to date are: Alabama, Arizona, Arkansas, Florida, Georgia, Illinois, Louisiana, Mississippi, Missouri, Nevada, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.[15]

In view of the limited time remaining in which these States may ratify the Equal Rights Amendment, the Commission considers it essential to confront directly the concerns responsible for the gap between support for the principle of equal rights and support for ratification of the ERA itself. Many of the arguments against ratification appeal to fears and ignore facts, confusing voters and legislators alike about the objectives and positive effects to be secured by the proposed amendment. The purpose of this report is to make clear to the women and men of this Nation who believe in the equal dignity of all individuals before the law that the Equal Rights Amendment is essential to achieving this goal.

Although State, local, and Federal government may act without the ERA to promote equal rights, the reality is that without the amendment, governments at all these levels have not taken—and most likely will not take—the steps necessary to rid their laws, policies, and practices of the sex bias that continues to intrude upon the lives of women and men in this country.[16] This report discusses this reality and responds to several questions repeatedly raised by those who favor equal rights but are uncertain about the ERA: Is the ERA still needed and how will it result in changes that are desirable? Will States be subjected to undue Federal efforts to enforce the ERA and accomplish these changes? Will State and Federal government alike be subject to undue intervention by the courts in this enforcement process?

With this report, the Commission renews its call for the Nation to consider the ERA on its merits, for "such consideration can only result in ratification and the long-awaited guarantee to women and men of equal justice under law."[17]

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[10] A Gallup poll taken in September 1980 showed 64 percent favoring the Equal Rights Amendment, similar to the 62 percent figure found in the Target Systems Inc. (TSI) National Survey conducted by Hamilton and Staff in June 1980. See, also, Yankelovich, Skelly & White, Survey for *Time Magazine*, Jan. 6-7, 1981 (63 percent of those surveyed expressed hope that the Reagan administration will work for passage into law of the ERA).

[11] A survey conducted by Louis Harris and Associates in February 1979 reported 65 percent in favor of efforts to strengthen women's status in society today. *Public Opinion*, December-January 1980, p. 33. An NBC-Associated Press survey of likely voters in July 1980 reported that 71 percent of those polled favored a constitutional guarantee of equal rights under law for women and men; in the same poll, 53 percent of those who had heard about the ERA indicated support for its passage.

[12] A *St. Louis Globe-Democrat* poll in Missouri, where the ERA has not been ratified, showed in 1976 that 60 percent of the voters favored ratification. See *St. Louis Globe Democrat*, Dec. 28, 1976, p. A-4. Similarly, a series of public opinion surveys between 1974 and 1978 in Illinois, another "unratified" State, showed that a majority of registered voters have consistently favored passage of the ERA; in 1978, 64 percent of those polled favored ratification. Richard Day Research, Urbana, Illinois, 1978.

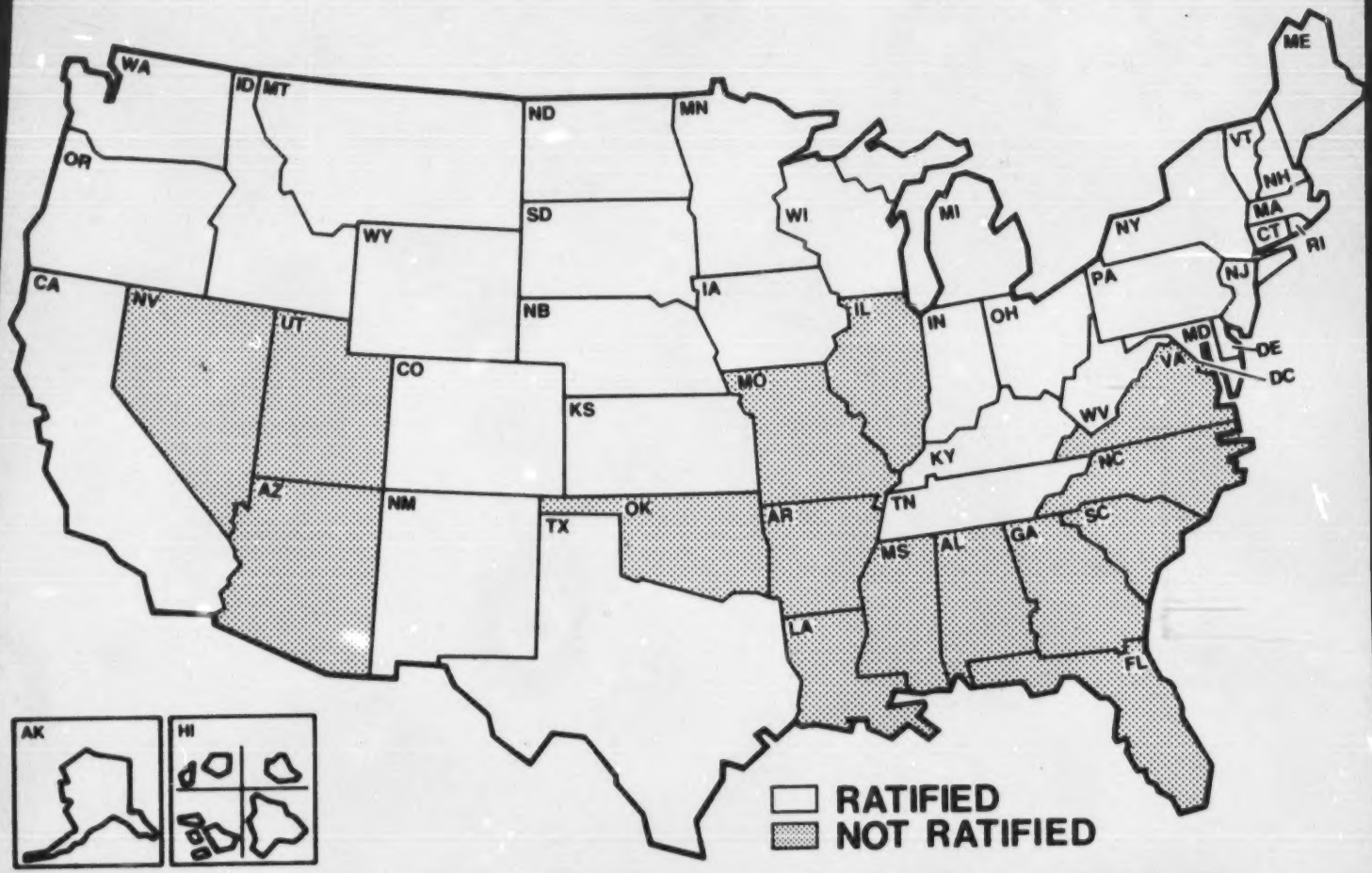
[13] The legislatures in four of these States, Idaho, Nebraska, South Dakota, and Tennessee, have since attempted to rescind their ratification; in a fifth State, Kentucky, legislative rescision has been vetoed by the acting Governor. Rescision of Constitutional amendment ratification votes has never been recognized as valid in the past. Ruth Ginsburg, "Ratification of the Equal Rights Amendment: A Question of Time," *Texas Law Review*, (1979) vol. 57, p. 919. The validity of rescision is the subject of litigation pending in the U.S. District Court for the District of Idaho. Idaho v. Freeman, Civil No. 79-1097 (D. Idaho, filed May 9, 1979).

[14] The original period for ratification ended Mar. 22, 1979. The U.S. House of Representatives approved a 39-month extension of the original deadline on Aug. 15, 1978, and the Senate followed suit on Oct. 6, 1978. 124 Cong. Rec. H8665 (daily ed. Aug. 15, 1978); 124 Cong. Rec. S17318 (daily ed. Oct. 6, 1978).

[15] Six of these States, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia, have never ratified the 19th amendment to the U.S. Constitution, which grants women the right to vote. Alan Pendleton Grimes, *Democracy and the Amendments to the Constitution* (Lexington, Mass.: Lexington Books, 1978), p. 96.

[16] It has been suggested that failure to ratify the Equal Rights Amendments might be taken as a signal by "[a]ctors in the political arena" that advocates of equal rights lack political power "so that positions and programs they support can be ignored safely, or at least deferred." Ruth Ginsburg, "Sexual Equality Under the Fourteenth and Equal Rights Amendment," *Washington University Law Quarterly* (1979), pp. 161, 177.

[17] *1978 ERA Statment*, pp. 31-32.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1. How Will Ratification of the Equal Rights Amendment Affect Laws and Governmental Action Concerning Women?

The system of laws in the United States is like a patchwork quilt: the rights of individuals in one State vary greatly from the rights of individuals in another; and where the actions of individuals are subject to Federal laws, their rights may be different still. This Federal system of government was carefully incorporated in the United States Constitution, and respect for the coexistence of State and Federal jurisdictions is basic to the Nation.

Within this system, however, certain principles of freedom and individual dignity have been viewed as preeminent. Thus, individual States are free to govern as they choose, but they may not interfere with freedom of speech; they may not discriminate on the basis of race, national origin, or religion; they may not deny an individual the right to vote on the basis of race or of sex.

The proposed Equal Rights Amendment is consistent with this scheme. It makes clear that men and women should be treated equally by all levels of government—the exclusive target of the ERA. The amendment is necessary because, historically, discrimination against individuals based on whether they are female or male has been deeply entrenched in our laws and persistently reflected in governmental action. The Senate Judiciary Committee that successfully recommended the amendment's adoption by Congress concluded that the ERA is essential because of the extensive sex discrimination

> directly attributable to governmental action both in maintaining archaic discriminatory laws and in perpetuating discriminatory practices in employment, education and other areas. The social and economic cost to our society, as well as the individual psychological impact of sex discrimination, are immeasurable. That a majority of our population should be subjected to the indignities and limitations of second class citizenship is a fundamental affront to personal human liberty.[18]

Some States have already undertaken a basic commitment to equal rights. But the piecemeal implementation of this commitment has been uneven, and other States have barely made the commitment at all. There are still "[t]housands of State laws, most of them historical hangovers, [that] typecast men and women."[19] Nor has the Federal Government fully removed sex bias from its own code and regulations.[20] Moreover, where States and the Federal Government have acted through their legislatures and courts to promote equal rights without regard to whether an individual is female or male, their actions are not secure. As the American Bar Association recently stated in explaining the need for the ERA:

> No ordinary statute can provide the bedrock protection assured by a Constitutional Amendment. No Court decision can provide that protection, for the courts may interpret, but they may not amend the Constitution.[21]

Ratification of the Equal Rights Amendment will provide a durable guarantee to women and men of equal status and dignity under the law.[22] It will allow us to live and develop free from the government intrusion that historically has classified and pigeonholed men and women according to stereotypes about their roles and capabilities. The devastating effect on women of this persistent discrimination and the changes to be secured by the ERA are discussed below.

[18] U.S., Congress, Senate, Committee on the Judiciary, *Equal Rights for Men and Women*, 92d Cong., 2d sess., 1972, S. Rep. 92-689, p. 7 (hereafter cited as *Senate ERA Report*).

[19] Ginsburg, "Sexual Equality," p. 174.

[20] See U.S., Department of Justice, Task Force on Sex Discrimination, Civil Rights Division, *Interim Report to the President* (Oct. 3, 1978) (hereafter cited as *Interim Report*); U.S. Commission on Civil Rights, *Sex Bias in the U.S. Code* (1977).

[21] American Bar Association, *About the ERA* (April 1980), p. 2.

[22] Ginsburg, "Sexual Equality," p. 161. (This is the "animating purpose" of the proposed Equal Rights Amendment.)

How Will the Equal Rights Amendment Affect Women in the Paid Labor Force?

Women's participation in the labor force has increased dramatically, with more women employed outside the home today than ever before in history. By 1979, 43 million women, or 51 percent of all women in this country, were employed or looking for jobs. Over 7.4 million held jobs in government alone—at Federal, State, and local levels. Statistics show that the participation of married women in the labor force is similar to that of all women: in March 1979, approximately 50 percent of all wives were employed or looking for jobs. For young women, the participation rate is even greater—64 percent of all women aged 25 to 34 were in the labor force by the end of the decade, including 54 percent of the mothers who are in this age group.[23]

Clearly, with a steadily increasing majority of all women employed, vast numbers of women are vulnerable to discriminatory employment practices based on sex. Moreover, where job opportunities and wages are limited by sex bias, the harm is not only felt by women, but also by the families they support, whether in conjunction with their husbands[24] or on their own as heads of household.[25]

Yet, despite the existence of Federal[26] and State[27] equal employment opportunity laws, women continue to be victims of pervasive discriminatory practices in the labor force. The ERA is needed to help end governmental action that limits opportunities available to women throughout the labor force and to close loopholes in existing antidiscrimination laws so as to make it clear that public employment practices that discriminate against women are illegal.

Laws Limiting Employment Opportunities for Women

• Equal employment opportunities for women continue to be limited by remnants of the restrictive labor legislation passed by the Federal and State governments in the late 19th and early 20th centuries and after the Second World War.[28] These laws limited the occupations open to women,[29] restricted the number of hours women could work,[30] and regulated working conditions for women.[31]

Stereotyped beliefs about women's roles and capabilities were given as the rationale for passage of these laws: women were seen as physically weak and as occupying only a transient and secondary role in the labor market. In addition to reinforcing and perpetuating these stereotypes, such restrictive labor laws also served to reduce the competition by women for better paying jobs.[32]

Rather than protecting women, the provisions discriminated against them by making it difficult for qualified women to obtain desirable and high-salaried jobs and by creating obstacles to promotions and supervisory positions.[33] The restrictive nature and discriminatory effect on women of protective labor legislation have been specifically acknowledged by the United States Senate as one of the reasons the Equal Rights Amendment is needed.[34]

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[23] See U.S., Department of Labor, Bureau of Labor Statistics, *Perspectives on Working Women: A Databook* (Bulletin 2080, 1980) (hereafter cited as *Perspectives on Working Women).*

[24] In 1978 full-time, all-year, wage-earning wives contributed approximately 38 percent of their families' income. Ibid., p. 57.

[25] Twenty-one million persons, or 13 percent of all families, were living in female-headed households in 1975. U.S., Commission on Civil Rights, *Women Still in Poverty* (1979), p. 18. Almost two-fifths of all families headed by women have incomes below the poverty level. A large proportion of these families are headed by black women whose families include half of all children living in poverty. U.S., Department of Labor, Women's Bureau, *The Employment of Women: General Diagnosis of Developments and Issues* (April 1980), p.7 (hereafter cited as *The Employment of Women).*

[26] The two principal Federal statutes that prohibit sex discrimination in employment are the Equal Pay Act, 29 U.S.C. §206(d) (1976) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1976).

[27] *E.g.*, Alaska Stat. §§18.80.220(a), 23.10.155 (1972 and Supp. 1979); Cal. Labor Code §§1197.5(a), 1413 (West 1971); Me. Rev. Stat. Ann. tit. 5, §4572, tit. 26, §628 (West 1964). Not all States, however, have such laws; for example, Alabama and Mississippi have not enacted State equal pay or fair employment practices laws.

[28] Barbara A. Brown, Ann E. Freedman, Harriet N. Katz, and Alice M. Price, *Women's Rights and The Law: The Impact of the ERA on State Laws* (New York: Praeger Publishers, 1977), p. 209.

[29] *E.g.*, N.Y. Labor Law §176 (McKinney 1965) (prohibited employment by women as messengers during certain hours), *repealed by* L. 1973, ch. 377, §11; Wash. Rev. Code Ann. §49.12.200 (1962) (prohibited women serving in public office), *as amended by* L. 1963, ch. 229, §1.

[30] *E.g.*, Ill. Rev. Stat. Ch. 48, §5 (1969), *repealed by* P.A. 80-266, §1, effective Oct. 1, 1977. See Brown and others, *Womens Rights and the Law*, pp. 210–11.

[31] *E.g.*, D.C. Code Ann. §36–310 (1968), *amended by* Act Oct. 1, 1976, D.C. Laws, No. 1–87, §37(a), D.C. Reg. No. 6, p. 1134. See *Women's Rights and the Law*, p. 211.

[32] Barbara Allen Babcock, Ann E. Freedman, Eleanor Holmes Norton, and Susan C. Ross, *Sex Discrimination and the Law: Causes and Remedies*, (Boston: Little, Brown 1975), pp. 247–87.

[33] Brown and others, *Women's Rights and The Law*, pp. 209–10.

[34] The *Senate ERA Report* states:

> Most States have enacted so-called "protective" labor legislation in one form or another. Many of these laws are not protective at all, but rather are restrictive, and have been shown to have a discriminatory impact when applied only to women. For example, a law which limits the working hours of women but not of men makes it more difficult for women to obtain work they desire and for which they are qualified, or to become supervisors. State laws which limit the amount of weight a woman can lift or carry arbitrarily keep all women from certain desirable or high-paying jobs, although many if not most women are fully capable of performing the tasks required. *Senate Report*, p. 9.

Although many of these discriminatory statutes have been repealed[35] or invalidated,[36] some still remain on the books as badges of sex discrimination and symbols of sex stereotyping operating to deprive women of jobs. For example, statutes that establish a maximum number of hours women are permitted to work in certain jobs still exist in Mississippi[37] and New Hampshire.[38] The doors to certain jobs are still entirely closed to women by laws in Arkansas,[39] Missouri,[40] Ohio,[41] and by the Federal Code.[42] These statutes, although of dubious validity, nevertheless continue to exist and may be tacitly enforced.[43] The woman who is denied a job because of such State or Federal laws will not always know enough about her legal rights to challenge the denial. If she does know her legal rights, she may not have the resources to pursue the battle to enforce them.

Ratification of the ERA will require that labor laws treat women and men equally. Not only will existing Federal and State restrictive laws that discriminate against individuals on the basis of their sex clearly be invalid,[44] but also ratification will provide the impetus necessary for Federal and State legislatures to act at last to eliminate the remaining sex-based laws from their respective codes during the 2-year legislative transition period.[45] During this revision process, protective labor provisions that really protect workers—such as laws that provide for rest periods, minimum wages, overtime pay, and health and safety protections—will, it is expected, be extended to cover both men and women. This extension of benefits would flow directly from the legislative intent expressed by Congress in adopting the Federal ERA.[46]

- Sex-based discrimination also is legislated into government programs intended to give welfare recipients the training and skills necessary for them to obtain employment and eliminate their dependence on welfare. For example, although three out of four individuals eligible and registered for job placement in the Federal work incentive program (WIN)[47] are women,[48] the program is required by statute to give priority to the placement of unemployed fathers.[49] Even when women are placed in jobs through WIN, their average entry wage is only $2.97 per hour, less than three-fourths of the average entry wage of $4.01 per hour earned by men placed by the program.[50]

Wage Discrimination

- The wage gap that persists between all employed women and men is even greater than the differential found among men and women in this Federal job training program. Employed women today receive, on the average, only 59 cents for every dollar earned by men.[51] Among the primary factors contributing to the creation and perpetuation of this wage gap are the occupational segregation of women employees and the lower wages paid in jobs that are, and traditionally have been, held largely by women.[52] Women workers continue to be concentrated in the lowest paying, least valued jobs, regardless of whether their employer is a branch of

[35] See U.S., Department of Labor, Employment Standards Administration, Women's Bureau, *State Labor Laws in Transition: From Protection to Equal Status for Women*, Pamphlet No. 15 (Washington, D.C.: Government Printing Office, 1976).

[36] E.g., Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) (invalidating weight-lifting and maximum hours statutes under Title VII); Manning v. General Motors Corp., 466 F.2d 812 (6th Cir. 1972), *cert. denied*, 410 U.S. 946 (1973) (invalidating job prohibition, weight, and maximum hours laws under Title VII); Garneau v. Raytheon Co., 323 F. Supp. 391 (D. Mass. 1971) (invalidating restrictive hours law under Title VII).

[37] Miss. Code Ann. §71-1-33 (1972).

[38] N.H. Rev. Stat. Ann. §§275.15-17 (1977).

[39] Ark. Stat. Ann. §52-612 (1971) (working in mines).

[40] Mo. Ann. Stat. §292.040 (Vernon 1972) (cleaning or working in certain places near machinery.)

[41] Ohio Rev. Code Ann. §4107.43 (Anderson 1973) (prohibits women from, among other occupations, being a gas or electric meter reader, bellhop, or bowling alley pin setter; operating nonautomatic freight elevators; or driving a taxi between 9 p.m. and 6 a.m.).

[42] 41 U.S.C. §35(d) (Supp. 1979) (certain government contracts must stipulate that females under 18 may not be employed in fulfilling the contract, while the minimum age for males is 16).

[43] Brown and others, *Women's Rights and the Law*, p. 218.

[44] Protective labor laws precluding women from employment opportunities have been invalidated under State ERAs. *E.g.*, Vick v. Pioneer Oil Co., 569 S.W.2d 631 (Tx. Ct. Civ. App. 1978). *See 1978 ERA Statement*, pp. 27-28.

[45] For example, in Massachusetts, a jurisdiction with a State ERA, the legislature has suspended the operation of statutes that restrict the jobs available to women. Mass. Ann. Laws ch. 149, §§53-54 (Supp. 1979), suspended by St. 1979, C. 146 (May 11, 1979). The legislature in Illinois, which also has a State ERA, repealed statutes that set a maximum number of hours women could work each day. Ill. Ann. Stat. ch. 48, §§5-8.1 (Supp. 1979), repealed by P.A. 80-266, §1, eff. Oct. 1, 1977.

[46] *Senate ERA Report*, p. 15.

[47] 42 U.S.C. §§630-644 (1976 and Supp. 1978). WIN is the only Federal employment program specifically targeted at recipients of Aid to Families with Dependent Children (AFDC), 90 percent of whom are women. *The Employment of Women*, p. 21.

[48] U.S., Commission on Civil Rights, *Women Still in Poverty* (1979), p. 14.

[49] 42 U.S.C. §633(a) (1976); see *Women Still in Poverty*, pp. 2, 14.

[50] *The Employment of Women*, p. 216.

[51] Ibid., p. 7. In fact, since the 1950s, the average annual earnings gap between female and male employees has increased. During the 1950s full-time female workers earned 64 percent of what similarly situated male employees earned. Today, that figure is 59 percent. Ibid.

[52] The intimate connection between occupational sex segregation and women's lower earnings is recognized in *The Employment of Women*, pp. 6-7.

the State or Federal government or a private corporation.[53] This job segregation is due, in part, to the legal barriers that historically barred women from certain jobs and employment activities[54] and to practices that until recently were sanctioned by law, such as the posting of job descriptions labeling positions as open only to men or to women.[55] In some instances the practice of labeling positions as "women's" or "men's" jobs persists.[56]

The low wages assigned to traditionally female jobs—paying government secretaries less, for example, than government parking lot attendants and ranking child care workers on a par with dog pound attendants[57]—result from and perpetuate women's social, economic, and legal disabilities.[58] In some instances, jobs held by women have been paid less because of overt discrimination.[59] Yet at present, there is considerable doubt as to whether any of the existing Federal or State antidiscrimination statutes reach such wage disparity even when it is directly traceable to sex-based wage discrimination.[60] The ERA would clearly prohibit such discrimination by public employers. This, in turn, would have an immediate effect on narrowing the earnings gap between men and women, since the Federal, State, and local governments employ more persons than any single private sector industry.[61]

Loopholes in Antidiscrimination Laws

• Existing laws prohibiting sex-based discrimination by public employers contain many loopholes that would be closed by the Equal Rights Amendment.[62] For example, while most government employees are protected from sex discrimination by Title VII of the Civil Rights Act of 1964,[63] the most comprehensive Federal statute prohibiting sex discrimination in employment, Congress carved out exceptions for the employment practices of its Members and other elected officials.[64] Similar exemptions are found in the Federal Equal Pay Act[65] and State antidiscrimination laws in jurisdictions such as Arizona,[66] Illinois,[67] and South Carolina.[68] Although legislators and other elected officials are not included within the scope of these laws prohibiting employment discrimination by the rest of the country, and their employees therefore have fewer

[53] Ibid., pp. 6–7, 42. Women comprise 99 percent of all secretaries, 98 percent of all food service workers, 90 percent of all health service workers, and 71 percent of all kindergarten, elementary, and secondary school teachers; yet women constitute less than 12 percent of all sales representatives, 21 percent of all shipping clerks, 6 percent of all craft workers, and 12 percent of all lawyers, and judges. *Perspectives on Working Women*, table 11, pp. 10–11.

[54] Ruth G. Blumrosen, "Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964," *University of Michigan Journal of Law Reform* (Spring 1979) vol. 12, pp. 402–4.

[55] Ibid., p. 405.

[56] See *Interim Report*, p. vi.

[57] Ellen Goodman, "Earning Less for Women's Work," *Washington Post*, Oct. 16, 1978, p. A–23.

[58] See Blumrosen, "Wage Discrimination," pp. 402–57.

[59] Ibid., pp. 421–26. See also, Center for Women in Government, "Sex-Segregated Career Ladders in New York State Government: A Structural Analysis of Inequality in Employment" (State University of New York, Albany, 1976); Winn Newman, "Policy Issues III," *Signs: Journal of Women in Culture and Society* (University of Chicago, 1976), p. 265.

[60] The Federal courts, for example, are divided as to whether women can assert a wage discrimination claim under Title VII where the claim would not fit within the narrow requirements of the Equal Pay Act (which requires equal pay only between jobs of equal skill, responsibility, and effort). *Compare* Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), *cert. granted.* —U.S.— (1980) (No. 80–429), and I.U.E. v. Westinghouse, 631 F.2d 1094 (3rd Cir. 1980), *petition for cert. pending*, with Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied.* —U.S.—, 101 S. Ct. 244 (Oct. 6, 1980), and Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977).

[61] See *Perspectives on Working Women*, p. 12. As of September 1980, Federal, State, and local governments employed 18 percent of all nonagricultural employees in the United States and 20 percent of all employed women. U.S., Department of Labor, Bureau of Labor Statistics, *Employment and Earnings December, 1980*, vol. 27, no. 12. The median earnings for women employed by the Federal Government are $240 per week; for men the weekly figure is $348. U.S., Department of Labor, Bureau of Labor Statistics, unpublished tabulations from the 1979 Current Population Surveys.

[62] Congress specifically recognized that the ERA is necessary in order to protect women workers completely. The *Senate ERA Report* states that Title VII and the Equal Pay Act "fail to reach discrimination in many areas, allow for substantial exemptions in some cases, and have often been implemented too slowly." *Senate ERA Report*, p. 7.

[63] 42 U.S.C. §§2000e–2000e–17 (1976 and Supp. III 1979).

[64] The exemption for State and local elected officials is spelled out in 42 U.S.C. §2000e(f) (1976), which excludes from the definition of "employee" for purposes of Title VII coverage

> any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate advisor with respect to the exercise of the constitutional or legal powers of the office unless such person is covered by appropriate State or local civil service laws.

The exemption for Members of Congress was created by limiting Title VII coverage of legislative employees to those in the competitive service. 42 U.S.C. §2000e–16(a) (1976) provides as follows:

> All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

The precise scope of this section is unclear; some employees within some congressional service agencies may be within the competitive service and therefore covered by Title VII. For a fuller discussion, see U.S., Commission on Civil Rights, *Extending Equal Opportunity Laws to Congress* (June 1980) (hereafter cited as *Extending Equal Opportunity Laws to Congress*).

[65] 29 U.S.C. §203(e)(2) (1978).

[66] Ariz. Rev. Stat. §41–1461(1) (1974).

[67] Ill. Ann. Stat., ch. 48, §852(c) (Smith-Hurd Supp. 1980–81).

[68] S.C. Code §1–13–30(h) (Supp. 1979).

rights, the evidence is that their employment practices are not immune from sex bias.[69] A 1980 study revealed, for example, that Members of Congress pay female employees lower salaries than male employees and give women fewer top jobs.[70]

Yet another loophole that exists on the face of Title VII, and has been relied upon to deny jobs to women, allows sex to be considered a "bona fide occupational qualification" for a job. On the basis of this exception, the Supreme Court of the United States held that a woman could be denied a government job as a prison guard because of her "very womanhood."[71]

Ratification of the ERA will require the cessation of sex-discriminatory employment practices by all government personnel and entities, including Members of Congress and administrators of governmental benefit programs such as WIN. It will reaffirm and make secure the government's commitment to equal opportunity for all workers. Adoption of the ERA will close existing loopholes for claims of discrimination by public employers and, generally, will provide the impetus for a more vigorous enforcement of antidiscrimination laws and policies.

How Will the Equal Rights Amendment Affect Women Who Are Married?

Laws concerning marriage traditionally have defined woman's rights as those of a second-class citizen.[72] Although many changes in such laws over the past century have brought greater equality to the legal status of husbands and wives, discriminatory provisions still persist in the patchwork quilt of laws that vary from State to State. Such laws set different rules for males and females entering marriage,[73] define different rights for them during marriage with respect to property,[74] to each other,[75] to their children,[76] and to third parties[77] and grant different rights at the end of the marriage.[78] These laws are rooted in the English common law view of the married woman as the property of her husband,[79] destined to be economically dependent upon him and obligated to provide him domestic services and companionship,[80] which were not recognized as having any economic value.[81]

Laws Concerning Marital Property and Rights of Husbands and Wives

Under the common law, married women suffered a total loss of property rights. In response to this harsh system, a movement began in the 19th century that led to the piecemeal passage of reforms. The purpose of the reform laws was to ensure that property a woman brought to her marriage or acquired afterwards would be her separate property, and not subject to the domination or improvidence of her husband or liable for his debts.[82] These reform laws varied greatly from State to State.[83] To this day, however, laws governing property rights during marriage retain outmoded and archaic common law concepts about ownership, possession, and control of marital property that discriminate against women.[84]

For example, some States still follow the common law presumption that household goods that were

[69] See *Extending Equal Opportunity Laws to Congress*, pp. 9–12. The U.S. Supreme Court has recognized that a cause of action for employment discrimination can be pursued against a Member of Congress based on the fifth amendment to the Constitution. Davis v. Passman, 442 U.S. 228 (1979).

[70] Florence Graves, "The Congressional Double Standard," in *Common Cause* (October 1980), p. 14; see, also, *Extending Equal Opportunity Laws to Congress*.

[71] Dothard v. Rawlinson, 433 U.S. 321, 336 (1977); See 433 U.S. at 345–47 (Marshall, J., concurring in part and dissenting in part).

[72] See generally *1978 ERA Statement*, pp. 5–8; Leo Kanowitz, *Women and the Law* (Albuquerque: University of New Mexico Press, 1969), pp. 35–99.

[73] See Ark. Stat. Ann. §55–102 (Supp. 1979); La. Civ. Code Ann. art. 92 (1972); Miss. Code Ann. §93–1–5(d) (1972).

[74] See discussion of marital property, following.

[75] See Ga. Code §53–501 (1974); Okla. Stat. Tit. 32, §2 (1971).

[76] See Thorne v. Odom. 349 So.2d 1126 (Ala. Sup. Ct. 1977) (fathers have priority over mothers as plaintiffs in actions for wrongful death or injury of a child).

[77] Under the common law, for example, only the husband had the right to sue third parties for the loss of "consortium," i.e., the loss of his wife's services. A 1950 District of Columbia case, Hitaffer v. Argonne Co., Inc., 183 F.2d 811 (D.C. Cir. 1950), held that a married women had a cause of action for loss of consortium, and courts applying State ERAs have done the same. See discussion of third party issues in *Laws Concerning Marital Property and Rights of Husbands and Wives*, following. The laws in 38 States and the District of Columbia have been changed to extend such rights to both spouses. Of the remaining 12 States, 6 follow the common law rule limiting loss of consortium suits to husbands, and 6 have abolished such actions for spouses of both sexes. See Brown and others, *Women's Rights and The Law*, p. 118.

[78] See discussion of divorce, following. See, also, Wisconsin, Governor's Commission on the Status of Women, *Real Women, Real Lives—Marriage, Divorce, Widowhood* (1978).

[79] See Blanche Crozier, "Marital Support," *Boston University Law Review* (January 1935), vol. 15, p. 28.

[80] See, e.g., Pierce v. Pierce, 267 So.2d 300, 302 (Miss. Sup. Ct. 1972); Tryon v. Casey, 416 S.W.2d 252 (Mo. Ct. App. 1967).

[81] Gebhard v. Gebhard, 253 Md. 125, 127–130, 252 A.2d 171 (1969). Later cases, however, recognized the value of nonmonetary contributions with respect to property rights in household goods and furnishings. Bender v. Bender, 386 A.2d 772 (MD. 1978).

[82] See National Bank of Rochester v. Meadowbrook Heights, Inc., 80 Mich. App. 777, 265 N.W.2d 43, 46 (1978); Kanowitz, *Women and the Law*, pp. 40–41.

[83] Ibid. See, e.g., Ark. Stat. Ann. §55–404 (1971); Conn. Gen. Stat. Ann. §46b–36 (Supp. 1980); Ky. Rev. Stat. §§404.010, 404.020, 404.050 (Supp. 1978).

[84] See generally Brown and others, *Women's Rights and the Law*, pp. 97–202.

purchased, possessed, and used by both spouses during the marriage belong solely to the husband.[85] Today in North Carolina, as was true under common law, real property held jointly by husband and wife in a form of co-ownership known as "tenants by the entirety" is under the exclusive control, use, and possession of the husband. Moreover, the husband is entitled to all the rents and profits produced by this property.[86]

Under the ERA, the equal right of a married woman to ownership, possession, and management of marital property during marriage will be strengthened. Discriminatory provisions would be invalidated. Thus, for example, applying its State ERA, the Pennsylvania Supreme Court has held invalid the common law presumption that household goods and furnishings belong to the husband.[87] This discriminatory presumption was similarly rejected in Virginia after the adoption of a State equal rights provision, when the legislature enacted a statute expressly prohibiting any presumption favoring one spouse over the other in determining ownership of tangible personal property.[88]

Laws giving husbands exclusive rights to control aspects of the marriage still exist in States such as Oklahoma, where a statute provides that the husband is the head of the household, that he may select any reasonable place of residence and the style of living, and that the wife must conform to his wishes.[89] A Georgia statute names the husband as "the head of the family and the wife. . .subject to him."[90] Louisiana persisted into 1979 with a law designating the husband as the "head and master" of all marital property.[91]

The ERA will result in changes in these and other laws that on their face treat males and females differently, such as laws that impose a different age of consent for marriage.[92] In addition, laws that grant different rights, privileges, or protections to wives and husbands will be invalid unless extended to both spouses.

For example, laws that give the husband alone the right to recover damages from a third party who negligently injures his spouse,[93] or for the wrongful death or injury of their child,[94] would be extended under the ERA to give the same right to the wife. Courts applying State ERAs in Pennsylvania,[95] Alaska,[96] Texas,[97] and Washington[98] have already extended the common law right to sue for "loss of consortium" so that women as well as men may recover from a third party who causes a spouse to become disabled, holding that husbands and wives are partners in marriage and must be treated fairly and equally.

Laws Concerning Support

The common law also imposed different rights and obligations on husbands and wives based on the view of husbands as solely responsible for support and wives for homemaking services and "companionship"[99]. However, the duty of support that was placed upon husbands never truly protected wives made vulnerable by the economic dependence imposed upon them.[100] Courts have refused to enforce support obligations *during* marriage, because they are unwilling to invade the privacy established by the marital relationship. As a result, even if a husband denies his wife money for her most basic needs—clothes, health care, food—she cannot, as

[85] See, *e.g.*, Upchurch v. Upchurch, 76 Ga. App. 215, 45 S.E. 2d 855 (1947).
[86] Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); Rauchfuss v. Rauchfuss, 33 N.C. App. 108, 234 S.E.2d 423 (1977) (Rents and profits may be charged with the support of the wife.)
[87] DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174, 178-79 (The court also relied on the "emancipation of married women over their property" and on changing social conditions to bolster their departure from earlier common law precepts.)
[88] Va. Code §55-47.1 (Supp. 1980).
[89] Okla. Stat. tit. 32, §2 (1971).
[90] Ga. Code §53-501 (1974).
[91] See Kirchberg v. Feenstra, 609 F.2d 727 (5th Cir. 1979) (declaring law unconstitutional and describing revisions effective Jan. 1, 1980), *prob. juris. noted*, — U.S.—, 100 S. Ct. 1899, (1980).
[92] Although at one time most States set different age minimums for males and for females, today all but three States impose the same age limitations on both sexes. Only Arkansas, Louisiana, and Mississippi maintain sex-based restrictions on the age of consent. Ark. Stat. Ann. §55-102 (Supp. 1979); La. Civ. Code Ann. art. 92 (1972); Miss. Code Ann. §93-1-5(d) (1972). Under the ERA, these sex-based age differentials would be invalid. The experience in Illinois, a jurisdiction with a State ERA, is illustrative. In Phelps v. Bing, 58 Ill.2d 32, 316 N.E.2d 775 (Ill. Sup. Ct. 1974), the court held that the differential age minimum for males and for females violated the Illinois State ERA.
[93] Roseberry v. Starkoutch, 73 N.M. 211, 387 P.2d 321 (1963). See Brown and others, *Women's Rights and the Law*, p. 118.
[94] Thorne v. Odom, 349 So.2d 1126 (Ala. Sup. Ct. 1977).
[95] Hopkins v. Blanco, 457 Pa. 90, 320 A.2d 139 (1974).
[96] Schreiner v. Fruit, 519 P.2d 462 (Alaska Sup. Ct. 1974).
[97] Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. 1978), *aff'd. sub nom.* Whittlesey v. Miller, 572 S.W.2d 665 (Tex. Sup. Ct. 1978).
[98] Lundgren v. Whitney's, Inc., 614 P.2d 1272 (Wash. Sup. Ct. 1980).
[99] Also related to this common law doctrine is the view that a husband has an absolute right to sexual relations with his wife. This is the basis for the virtually universal rule prohibiting married women from charging their spouses with rape. Brown and others, *Women's Rights and the Law*, p. 54. As of June 1980, 47 States barred a woman from charging her husband with rape if she were married and living with him. National Center on Women and Family Law, Marital Rape Exemption, mimeographed (New York: undated). A few States have stricken or modified the marital rape exemption. New Jersey law, for example, provides that "No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim." N.J. Stat. Ann. §2C:14-5(b) (West Supp. 1980).
[100] See generally Kenneth Davidson, Ruth Ginsburg, and Herma Hill Kay, *Sex-Based Discrimination* (West Publishing Co. 1974), pp. 139-48.

long as she continues to live with him, realistically expect to obtain a court order requiring him to provide her with reasonable support money.[101] As a practical matter, before a wife can obtain a support order there must be a breakdown of the marital relationship and an action commenced for legal separation or divorce.[102] Contrary to popular belief, support laws do not help to keep a family intact.

The husband's duty to support his wife has traditionally been treated more seriously by the legal system when the victim is a creditor who has furnished the wife with "necessaries" for her support. Under this common law "necessaries doctrine," husbands have been held liable to creditors for necessaries purchased by wives.[103]

As with the duty of support, however, this legal doctrine does not give the wife any effective rights. It does not increase her ability to make purchases for which her husband would be held liable. Due to the burden of litigating to enforce the husband's duty, many merchants are not willing to extend credit to a woman in her own name for the purchase of necessaries; store owners often require the husband to sign before credit will be granted to the wife.[104]

The Supreme Court of the United States and State courts have already signaled the unconstitutionality of laws imposing different financial responsibilities on married individuals solely on the basis on whether they are female or male.[105] Many States have addressed the inequities inherent in the common law scheme and enacted statutes that require both spouses to support each other according to their respective financial means and needs[106] and/or family expense laws making both spouses responsible to creditors for family purchases.[107]

The Equal Rights Amendment, similarly, will require that marriage laws be based on functions performed by spouses within the family instead of on gender. This would leave couples free to allocate responsibilities according to their own preferences and capabilities, so that husband and wife will be responsible to each other to an extent consistent with their individual resources, abilities, and the type of contribution each person makes to the family unit. This analysis is consistent with the reality that marriage is an economic as well as social and emotional partnership, where each spouse makes equally valuable, albeit different, contributions.[108]

The ERA will not require, however, that a husband and wife contribute identical amounts of money to a marriage. It will not require that the wife obtain an income-producing job outside the home. As the legislative history of the ERA makes clear:

> The support obligations of each spouse would be defined in functional terms based, for example, on each spouse's earning power, current resources and nonmonetary contributions to the family welfare. . . .[W]here one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.[109]

The crucial importance of the homemaker's contribution to the marriage is expressly recognized in the debates and reports that form the legislative history of the Equal Rights Amendment.[110] The

[101] See, *e.g.*, Commonwealth v. George, 358 Pa. 118, 56 A.2d 228 (1948); McGuire v. McGuire, 157 Neb. 226, 59 N.W.2d 336 (Neb. Sup. Ct. 1953). The court in *McGuire* stated:

> As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out. 59 N.W.2d at 342. See also Paulson, "Support Rights and Duties," *Vanderbilt Law Review* (1956), vol. 9, pp. 709, 719.

[102] *Id.*

[103] This rule flows directly from the husband's supposed obligation to support his wife. The law presumed that the wife incurred liabilities for necessaries because the husband did not provide her with money to buy needed goods and services. Therefore, it became the husband's duty to reimburse the creditors who furnished these items to his wife. Jersey Shore Medical Center-Fitkin Hospital v. Estate of Baum, 417 A.2d 1003, 1005 (N.J. Sup. Ct. 1980).

[104] Judith Areen, *Cases and Materials on Family Law* (Mineola, N.Y.: The Foundation Press, 1978), p. 73.

[105] See Orr v. Orr, 440 U.S. 268 (1979) (statute under which husbands, but not wives, could be ordered to pay alimony, violates the equal protection clause of the United States Constitution). See, also, Manatee Convalescent Center, Inc. v. McDonald, 7 Family Law Reptr. 2181 (Fla. Ct. App., Dec. 31, 1980); Jersey Shore, 417 A.2d 1003.

[106] *E.g.*, Cal. Civ. Code §5132 (West Supp. 1974); Del. Code Ann. tit. 13, §§502, 506 (Supp. 1978); Mont. Rev. Code Ann. §36-103 (Supp. 1977); Va. Code §20-61 (Supp. 1979).

[107] *E.g.*, Colo. Rev. Stat. §14-6-110 (1973); Ill. Ann. Stat., ch. 68, §15 (1976); Utah Code Ann. §30-2-9 (1976); Wyo. Stat. §20-1-201(1977).

[108] *E.g.* Jersey Shore, 417 A.2d 1003. Recognition of this reality forms the theoretical underpinnings of marital property laws in the eight community property States and is the major guiding principle behind model legislation developed in 1970, the Uniform Marriage and Divorce Act (UMDA). See, Krauskopf, "A Theory for 'Just' Division of Marital Property in Missouri," *Missouri Law Review* (1976), vol. 41, p. 165. The original UMDA was approved by the Commissioners of Uniform Laws in August 1970. It is a model act—proposed legislation for the States to enact as they deem appropriate—and only becomes the law when adopted by a State legislature.

[109] *Senate ERA Report*, p. 17.

[110] Ibid. See, also, Barbara A. Brown, Thomas I. Emerson, Gail Falk, and Ann E. Freedman, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," *Yale Law Journal* (1971), vol. 80, pp. 871, 936-954.

ERA's mandate that this contribution be recognized has been judicially[111] and legislatively[112] acknowledged in States that already have equal rights provisions in their constitutions. Such legal recognition is essential for homemakers to gain meaningful economic security during and after marriage; the ERA will give such legal recognition an anchor in the Federal Constitution for improving the status of homemakers in all States.

The ERA will accelerate legal recognition of modern marriage as a partnership in which marital property belongs to both spouses and the homemaker's contribution to the marriage is appreciated. It will also ensure that the persistent remnants of sex-biased property laws that severely disadvantage and restrict married women will be eliminated, and it will prohibit their reenactment by the Federal or State governments.

How Will the Equal Rights Amendment Affect Women and Children Facing Disruption of Their Families by Divorce?

There has been a rising rate of divorce in the United States over the past 20 years. The Bureau of the Census predicts that if the trend continues, almost 40 percent of all marriages will end in divorce.[113] This prospect is grim for men and women alike, but the reality it signals has its harshest effect upon women, especially those who accept the responsibility of being a full-time homemaker during part or all of the married years. By invalidating sex-based stereotypes and presumptions in family law and encouraging legal recognition that marriage is an economic as well as social and emotional partnership, the ERA will help women facing divorce by making the legal system operate more equitably.

Economic Survival: Support and Marital Property

Divorce has been recognized as a primary cause of poverty among women and children.[114] Studies document the differential effect of divorce on the economic status of men and women. Even fathers who pay child support are often better off financially after divorce than they were before.[115] In sharp contrast, many women and children face severe economic problems at the time of divorce.

- Sex-based presumptions have traditionally contributed to inequities when divorcing spouses divide their accumulated property, such as the house, household goods, and bank accounts. Such presumptions operate to disadvantage most severely the homemaker spouse. For example, under common law, it was presumed that household goods accumulated during the marriage and used by both spouses belonged to the husband only, unless the wife could demonstrate her financial contribution.[116] This presumption often operated to deprive the woman who contributed homemaking services rather than dollars to the marriage of the property she thought had been hers. Similarly, in some States today, the wife's services to her husband's business are presumed to be gratuitous; in these States courts will deny a wife's claims for property rights based on the time and effort she has contributed to her husband's business.[117]

The ERA would invalidate such presumptions and encourage recognition of the economic value of homemaker services, a result already accomplished in Pennsylvania under its State equal rights amendment.[118] Relying on the Pennsylvania ERA, the State's supreme court concluded that the common law presumption of "husband's ownership" of household goods could not survive constitutional scrutiny. This one-sided presumption, the court said, failed to acknowledge the equally important and

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[111] *See, e.g.*, DiFlorido v. DiFlorido, 459 Pa. 641, 331 A.2d 174 (Pa. Sup. Ct. 1975).

[112] In Montana, for example, where an ERA is already part of the State constitution, the support law specifically states that each spouse must support the other to the extent each is able and that support includes the nonmonetary support provided by a spouse as homemaker. Mont. Rev. Codes Ann. §36-103 (Supp. 1977).

[113] U.S., Department of Commerce, Bureau of the Census, *Divorce, Child Custody and Child Support* (June 1979), p. 1 (hereafter cited as *Divorce, Child Custody and Child Support.*)

[114] Foundation for Child Development, *State of the Child: New York City II* (June 1980) pp. 45-46, 51-52; see *Divorce, Child Custody and Child Support*, pp. 4-5. Almost one-third of all women receiving child support need public assistance. *Divorce, Child Custody and Child Support*, table 8, p. 14.

[115] See David Chambers, *Making Fathers Pay: The Enforcement of Child Support* (Chicago: University of Chicago Press, 1979), p. 42-50; Saul Hoffman and John Holmes, "Husbands, Wives and Divorce," pp. 27, 31, in *Five Thousand American Families—Patterns of Economic Progress*, vol. IV, ed. G. Duncan and J. Morgan, Institute for Social Research, University of Michigan, (Ann Arbor, Michigan 1975). Although the studies show a decline in absolute income for divorced men, when income is considered on a per capita basis, their economic status often improves. Lenore Weitzman and Ruth Dixon, "The Alimony Myth: Does No-Fault Divorce Make a Difference?" *Family Law Quarterly* (1980), vol. XIV, pp. 172-78.

[116] DiFlorido v. DiFlorido, 331 A.2d at 178, n.10.

[117] See Leatherman v. Leatherman, 297 N.C. 618, 256 S.E.2d 793, 796 (N.C. Sup. Ct. 1979) (wife denied property interest in husband's business even though she performed services for the business, which was capitalized out of money from their joint bank account; services of the wife to the husband or his business are presumed gratuitous).

[118] DiFlorido v. DiFlorido, 331 A.2d at 179.

often substantial nonmonetary contributions made by both spouses.[119] Even where the husband is the "sole provider," the court reasoned that the State's equal rights amendment requires recognition of the contribution of the homemaker wife and concluded that, in the absence of evidence to the contrary, it must be presumed that the property is held jointly.[120]

Thus, the Pennsylvania ERA has already resulted in establishing as a starting point in the division of household goods the presumption that the contributions of the homemaker and the spouse with a paying job are equal.[121]

• In addition to dividing accumulated marital property, divorcing spouses must determine their respective responsibilities for alimony and child support.[122] The Supreme Court of the United States already has established that statutes imposing different responsibilities in this area on the basis of sex are invalid under existing constitutional law.[123]

Consistent with this rule, many States have already, either through court decision or statute, revised their laws to provide for alimony or maintenance awards for a dependent spouse—regardless of whether the spouse is female or male.[124] However, few situations arise where such "sex-neutral" laws result in charging a woman with the support of her former husband, since the reality is that most husbands are not economically dependent on their wives. The rare cases where courts have found such dependency illustrate the fairness of the "mutual responsibility" doctrine.[125]

Some States have followed similar reasoning in changing laws that previously assigned child support duties to fathers only, solely on the basis of sex.[126] These States have determined that both parents have the duty to support their children.[127] By analyzing the facts on a case-by-case basis, the courts in these jurisdictions are in a position to assess the financial position of each parent and to award child support realistically.[128]

This gender neutrality will operate fairly, however, only if a value is placed on the contribution to child support made by the custodial parent, who is most often the mother. The way the ERA will promote this important safeguard for women is already seen in States that have added equal rights provisions to their constitutions.[129] While holding that the State ERA requires that both parents be obligated equally to support their children, these States are not interpreting such mutual responsibility as requiring mathematical equality in the monetary contribution of mother and father.[130] On the contrary, for example, one court in a State ERA jurisdiction held that courts need to consider the importance of the emotional contribution to a child's welfare provided by a nonworking custodial parent and not merely the potential monetary contribution that parent might provide if employed.[131]

By not automatically imposing a financial support burden on both spouses, these rulings have supported the continued provision of child rearing by custodial parents. In fact, one Pennsylvania court

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[119] *Id.*

[120] *Id.* at 179, 180.

[121] Lower courts in Pennsylvania have begun to apply this rule to real property as well. See Bibighaus v. Bibighaus, 66 Del. 281, 288–90 (Delaware County, Del. 1979).

[122] Few divorced women are awarded alimony, and fewer still receive alimony payments. In 1978, only 14 percent of divorced women reported that they were awarded alimony; only two-thirds of those women actually received some payment, the amount averaging about $2,850. Only one-half of divorced and separated women with children under 21 were supposed to receive child support in 1978; only one-half of those mothers received the full amount of child support that had been awarded. Among all mothers who received some child support, the mean payment was $2,000. U.S., Department of Commerce, Bureau of the Census, *Child Support and Alimony: 1978* (advance report), p. 1, and table A, p. 3. There is no evidence that this represents any "new" trend: data collected by the Bureau of the Census indicate that only 9.3 percent of divorces between 1887 and 1906 included provisions for permanent alimony, as did 15.4 percent of divorces in 1916 and 14.6 percent of those in 1922. Weitzman and Dixon, "The Alimony Myth: Does No-Fault Divorce Make A Difference?" p. 180.

[123] Orr v. Orr, 440 U.S. 268 (1979). The Court reasoned that sex could not be used as a "proxy" for need and suggested that individualized hearings in which need for alimony could be established would better fulfill the State's objective of aiding the "needy spouse." *Id.* at 280–82. This result does not mean that all women are now or will be required to pay alimony to their husbands. Rather, as the Court suggested, trial courts will now evaluate the financial position of each spouse before making a determination of the amount, if any, of alimony one spouse will be ordered to pay the other. This determination will be made on a gender-neutral basis—the criteria being financial need, not sex. *Id.* at 282–83.

[124] *E.g.*, Ariz. Rev. Stat. Ann. §25-319 (1976); Fla. Stat. Ann. §61.08 (Supp. 1979); Ga. Code Ann. §30-209 (1969); Ill. Ann. Stat. ch. 40 §505 (Smith-Hurd Supp. 1980–81); N.J. Stat. Ann. §2A-34-23 (West Supp. 1980–81); N.C. Gen. Stat. §50-16.2 (1976); Okla. Stat. Ann. tit. 12 §1276 (West Supp. 1980–81).

[125] In Tignor v. Tignor, Div. No. 12601 (Md. Cir. Ct., Anne Arundel County, 1974), for example, the husband was awarded support from his wife when the marriage dissolved because he was blind and had relied on his wife's financial support during the marriage.

[126] *E.g.*, Ala. Code §30-2-31 (Supp. 1980); Fla. Stat. Ann. §61.13 (Supp. 1980); Minn. Stat. Ann. §518.17 (Supp. 1981); Conway v. Dana, 318 A.2d 324, 326 (Pa. 1974). *Cf.* McCrary v. McCrary, 599 P.2d 1248 (Utah 1979) (affirming trial court's decision modifying divorce decree to require former wife, rather than husband, to pay child support).

[127] *Id.*

[128] *E.g.*, Com. ex. rel. Wasiolek v. Wasiolek, 380 A.2d 400, 403 (Pa. Super. Ct. 1977).

[129] See, for example, Rand v. Rand, 280 Md. 508, 374 A.2d 900 (Md. Ct. App. 1977); Conway v. Dana, 318 A.2d 324 (Pa. 1974); Krempp v. Krempp, 590 S.W. 2d 229 (Tex. Ct. Civ. App. 1979).

[130] *E.g.*, Rand v. Rand, 374 A.2d at 905 (parents share responsibility for parental support "in accordance with their respective financial resources"); Krempp v. Krempp, 590 S.W.2d at 230 ("equality does not require that the courts. . .make equal the amount of financial contribution required of the spouses"). See *1978 ERA Statement*, pp. 24–25.

[131] Com. ex. rel. Wasiolek v. Wasiolek, 380 A.2d 400.

specifically held that permitting a nonworking parent to remain at home until the child matures does not violate that State's ERA.[132] Ratification of the Federal ERA would promote the uniform adoption of these principles in all jurisdictions, to the benefit of all families.

Child Custody Determinations

In most States today, contested custody determinations are made on the basis of the "best interest of the child" and the fitness of the parent. The analysis of the child's best interest has traditionally been clouded by sex-based stereotypes that presumed that the mother was more fit to be the custodial parent than the father, especially when a child of "tender years" was involved. These sex-based presumptions are increasingly being rejected.[133]

However, sexual stereotypes still operate as factors in custody decisions in some States, such as Oklahoma, where the custody preference is for the mother when the child is of tender years and for the father when the child is old enough to require education and preparation for the world of work.[134] Sex-based stereotypes also intrude as the changing roles of men and women are viewed as inappropriate by the courts. For example, women who work outside the home or who attend school have been penalized for not conforming to a mother's "proper role."[135]

The ERA's clear rejection of sex-based stereotypes, and the importance of such a constitutional mandate to the courts, will provide a basis for arguing that such presumptions are invalid. Without such overbroad generalizations about a mother's and father's "proper role" to fall back upon, courts must meaningfully assess the respective households and, therefore, act more effectively in the best interests of the child.

The experience in States with equal rights provisions in their constitutions has demonstrated that such nonbiased custody determination mandated by the ERA neither requires nor has resulted in widespread denial of custody to mothers. In fact, the Colorado Supreme Court rejected the contention that Colorado's State ERA[136] was violated because a majority of women in divorce cases were granted custody.[137]

How Will the Equal Rights Amendment Affect Women Dependent on Pensions, Insurance, or Social Security?

Single women (those who never married or are now widowed or divorced) comprise almost three-fourths of our nation's elderly who are living in poverty.[138] One out of every three single women over the age of 65 has income below the poverty rate.[139] Unfortunately, the income protections for old age that individuals can secure from pensions, insurance plans, or social security are not always available to women. When they are, the costs are often higher or the benefits are lower for women than for men.

The ERA will strengthen the position of women seeking income protection by prohibiting sex-based discrimination in insurance, pensions, and retirement security programs that involve governmental action.

The Social Security System

Social security is our nation's principal program for providing income security when earnings are lost due to retirement, disability, or death.[140] Although over one-half of all social security recipients are women,[141] the program fails to provide equitable treatment or adequate protection for women.[142]

The debate surrounding passage and ratification of the ERA has helped to expose the effects of the social security system's perpetuation of employment discrimination and the way it operates to penalize

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[132] *Id.* at 403.

[133] See, *e.g.*, Del. Code Ann. tit. 13, §722 (1974); Mass. Gen. Laws Ann. ch. 208 §31 (West 1958); N.D. Cent. Code Ann. §14-0-9-06 (1971); Ore. Rev. Stat. §107.137 (1977).

[134] Okla. Stat. Ann. tit. 30 §11(2)(1976).

[135] A trial court in Iowa, for example, recently denied custody of her sons to a mother attending law school, concluding that the demands of study and the ability of the father to engage in various activities with the children required that the father be granted custody. The Iowa Supreme Court reversed, finding that the court's conclusions not only lacked evidential support, but that the court's award was improperly based, in part, on a stereotyped view of sexual roles that has no place in child custody adjudication. The Iowa Supreme Court found that it was in the children's best interest that they live with their mother. *In re Marriage of Linda Low Tresnak and Emil James Tresnak*, Case No. 170/3997, slip op. (Iowa Sup. Ct., Sept. 17, 1980).

[136] Colorado State Constitution, Art. II, Sec. 29.

[137] *In re Marriage of Franks*, 542 P.2d 845, 852 (Colo. Sup. Ct. 1975).

[138] U.S., Department of Health, Education, and Welfare, *Social Security and the Changing Roles of Men and Women*, (February 1979), appendix C, p. 168 (hereafter cited as *Changing Roles*).

[139] One of every three single women over the age of 65 has income less than the poverty rate of $2,730 per year. Ibid., pp. 167-70.

[140] The Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified in scattered sections of 2, 26, 42, and 45 U.S.C.), as amended (1976 and Supp. III 1979). See, also, *Changing Roles*, p. 4.

[141] *Changing Roles*, p. 4.

[142] Ibid., pp. 10-12. Nearly 80 percent of all female beneficiaries receive less than $3,300 per year in social security payments; only 30 percent of male beneficiaries receive benefits below this level. Ibid., p. 23.

women for motherhood and the time they spend as homemakers.

Full-time homemakers have never been accorded any independent social security coverage. The only benefits available for women who have not been employed in the labor force are derived from their husbands' work. The economic value of a woman's work as homemaker is ignored. If she becomes disabled, her family may not receive benefits in the same way it may when the wage earner becomes disabled.[143] Since she is not credited with any retirement benefits in her own right, her eligibility to receive social security is linked permanently to her husband's status, is limited to a ceiling of 50 percent of his basic benefits, and commences only after he retires.[144] If she experiences mandatory "retirement" because of widowhood or divorce, this total dependency is likely to leave her without adequate income in her old age and in some circumstances may leave her without any income at all.

If a homemaker is divorced, the most she can receive under social security is half of her former husband's benefits (while he receives 100 percent), hardly ever adequate to support her living alone.[145] If *he* chooses to work beyond retirement age, *she* must survive without any payments during that period.[146] If he chooses to retire early, her maximum benefits may be reduced.[147] If the marriage lasted less than 10 years, she would not even be eligible for these inadequate benefits.[148]

- A widowed homemaker is not entitled to any benefits at all until she reaches 60 years of age, unless she is still caring for minor children[149] or is at least 50 years of age *and* disabled.[150] The average monthly benefit received by disabled widows in 1978 was only $166—or $1,992 per year.[151] Since few widows receive private pensions, the resulting poverty often is inescapable.[152]

The woman employed in the paid labor force must choose between taking benefits based on her own work history or as a dependent, based upon her husband's earnings.[153] Often because of the job segregation of women in lower paying jobs, women find that dependent benefits are higher than their own.[154] This problem is compounded by the fact that women who take time out of the paid labor force (or work part time) to provide child care and homemaking services for their families are penalized for motherhood, since their social security benefits are based on average lifetime earnings lower than those of men who work uninterrupted in the paid labor force. As a result, the average monthly benefit received by women retiring in November 1978 from work in the paid labor force was only $215, less than two-thirds of the average payment received by male retirees.[155] Many women, therefore, forfeit their own contributions, collecting dependency benefits instead. These women find themselves in the same vulnerable position as the woman who never worked in the paid work force.

These major inadequacies and inequities of the social security system—the burden of which falls most heavily on women—are due in large part to the sex-based assumptions underlying the program: that the family consists of one "individual breadwinner" (the husband) and "dependents" (the wife and children), and that dependents need (or have earned the right to) less income security than "individual breadwinners." These assumptions fail to recognize the value of work in the home and the discriminatory wage structure in the labor force. They also fail to reflect the diversity of family roles played by women today: some married women are lifetime homemakers; others are paid workers throughout their lives; still others play both roles during different times in the marriage; and many divorced and widowed women return to work after their marriages end.[156]

The U.S. Department of Health, Education, and Welfare issued a comprehensive report in 1979 with

[143] 42 U.S.C. §423(c) (1976). See, also, Garrett v. Secretary of H.E.W., 397 F. Supp. 400 (D. Va. 1975); *Changing Roles*, pp. 11, 27–28.
[144] 42 U.S.C. §402(b)(2) (1976 and Supp. III 1979).
[145] *Id.* See also President's Commission on Pension Policy, *Working Women, Marriage and Retirement*, p. 6 (August 1980); *Changing Roles* pp. 23–24.
[146] 42 U.S.C. §403(b) (1976). See *Changing Roles*, p. 24.
[147] 42 U.S.C. §§402(q) (1976 and Supp. 1979).
[148] 42 U.S.C. §402(b)(1)(G) (Supp. III 1979). See, also, *Changing Roles*, p. 23.
[149] 42 U.S.C. §§402(e)(1)(B), 402(g) (1976 and Supp. III 1979). See also *Changing Roles*, p. 14.
[150] 42 U.S.C. §402(e)(1)(B) (1976).
[151] *Changing Roles*, p. 28.
[152] Ibid., p. 25.
[153] 42 U.S.C. §§402(a)(b)(1976). See also *Changing Roles*, pp. 4–5, 10.
[154] Ibid.
[155] *Changing Roles*, p. 10.
[156] Ibid., p. 1. Some of the inequities providing different dependency benefits to male and female dependents—but not all—have been eliminated. Ibid., pp. 14–19; President's Commission on Pension Policy, *Working Women, Marriage and Retirement*, Appendix A, (hereafter cited as *Working Women.*) But the more subtle and devastating discrimination against women in social security persists.

recommendations targeted at major reform of the system.[157] These proposals, and changes recommended by others,[158] reflect not only a rejection of the inherent unfairness of women forfeiting their own contributions to the system, but also a clear recognition of the economic as well as social value of the homemaker services.

As discussed above, the ERA will provide a constitutional basis for urging recognition of the value of the homemaker's contribution to a marriage. Ratification will keep the pressure on Congress to adopt reform legislation designed to eliminate the social security system's inequitable treatment of women.

Pensions and Disability Insurance

Women often are not in a position to purchase disability insurance and pension plan coverage, since they are concentrated in homemaking, service, and clerical jobs[159] that usually are not accompanied by any insurance benefits program and have a low rate of pension coverage if available.[160] Federal law regulating private pensions allows provisions that result in a loss of benefits by women.[161] The discrimination women face in employment is thus perpetuated in retirement. As a result, men are twice as likely as women to be covered by pensions.[162]

Where coverage is available, many women are required to pay higher premiums than their male coworkers to acquire the same benefits,[163] thereby reducing their take-home pay; other women pay the same premium as male coworkers, but receive lower benefits.[164] These disparaties result from the calculation of insurance rates according to sex-based actuarial tables which show that women, on the average, live longer than men.[165] In some States the use of such tables is authorized by the government itself.[166] However, the justification for resulting discriminatory rates often is not supported by actual facts.[167] Because of practices such as these, women in the paid labor force and their families are forced to accept inferior coverage that makes their future economic security tenuous.[168]

The Supreme Court of the United States has held that the use of sex-based actuarial tables to compute premiums for retirement benefits provided by an employer to all employees violates Title VII's prohibition against sex discrimination in employment.[169] The Court found that charging women higher premiums because of statistics showing that women on the average live longer than men discriminated against women.[170] The Court suggested that other classifications more significantly linked to longevity—such as smoking, weight, or physical fitness—might be used more fairly than the employee's sex as a basis for determining rates.[171] The effect of this decision is limited, however, since it applies only to employer-operated insurance plans and not

[157] *Changing Roles.*

[158] For example, legislation that would provide social security credits for individuals who perform homemaker services has been introduced in past Congresses. Ibid. p. 104.

[159] *The Employment of Women*, p. 7.

[160] Naomi Naierman and Ruth Brannon, "Sex Discrimination in Insurance," in U.S., Commission on Civil Rights, *Consultation on Discrimination Against Minorities and Women in Pensions and Health, Life and Disability Insurance* (April 1978) pp. 473–74 (hereafter cited as *Consultation on Discrimination in Pensions and Insurance).*

[161] For example, the Employee Retirement Income Security Act of 1974 (ERISA), which governs private persions, permits employers to require an employee to work 10 years before being entitled to a pension and to work at least 1,000 hours in a year before entering a plan. 29 U.S.C. §§1052(a)(3)(A), 1053(a)(2)(A) (1976). This disadvantages women who enter and leave the work force to devote time to child-rearing responsibilities. *Working Women*, p. 37, appendix C, pp. 70–71.

[162] Ibid. p. 31.

[163] For example, one 1974 study demonstrated that women were charged premiums one and a half times higher than those charged to men in the same job classifications. Naierman and Brannon, "Sex Discrimination in Insurance," *Consultation on Discrimination in Pensions and Insurance*, p. 480. A complaint currently pending before the Insurance Commissioner of the Commonwealth of Pennsylvania challenges a disability insurance premium charge that is approximately 25 percent higher for female workers than it is for male employees receiving the same coverage. Starer v. Browne, Docket No. P80-8-11 (filed Aug. 14, 1980).

[164] A recent New York case involved a pension plan administered by the group that administers most of the pension plans covering university faculty in the United States. The challenged plan paid women benefits 10 percent lower than benefits paid to men. Spirt v. Teachers Insurance and Annuity Association, 475 F. Supp. 1298 (S.D. N.Y. 1979). See also EEOC v. Colby College, 18 E.P.D. @8734 (1st Cir., 1978); Peters v. Wayne State University, 21 E.P.D. @30,344 (D. Mich. 1979).

[165] Note, "Challenge to Sex-Based Mortality Tables in Insurance and Pensions," *Women's Rights Law Reporter* (Fall/Winter 1979–80), vol. 6, pp. 59–64.

[166] In inviting proposals for a pension plan to cover State employees, Missouri instructed bidders to list payout benefits and premium rates for males and females. Missouri, Deferred Compensation Commission, *Invitation for Proposals for the State of Missouri Deferred Compensation Plan for Public Employees* (May 1979). See also Mo. Rev. Stat. §104.530 (1969).

[167] In the area of health and disability insurance, for which women are charged higher premiums, there is evidence that women have shorter hospital stays than men. H. Denberg, "An Overview Report: Discrimination in the Insurance Marketplace and in the Insurance Business," *Consultation on Discrimination in Pensions and Insurance*, p. 271. A New York State Insurance Department study suggests that women's claim costs for accident-only benefits are lower than that of men at certain ages. New York State Insurance Department, *Disability Insurance Cost Differentials Between Men and Women.* (June 1976) (excerpted in *Consultation on Discrimination in Pensions and Insurance*, p. 565.)

[168] The pension benefits received by women are typically one-half of the amount of men's benefits. *Working Women*, p. 31.

[169] City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 710–11 (1978).

[170] *Id.* at 711. See "The Supreme Court, 1977 Term," *Harvard Law Review* (1978), vol. 92, pp. 299–301.

[171] See *City of Los Angeles*, 435 U.S. at 710.

to policies taken by individuals with private insurance companies.[173] At least one Federal district court has already begun to cut back the potential effect of this decision by exempting certain employer plans from Title VII's coverage.[173] Further, it is not yet clear whether the discriminatory practice invalidated by the Court extends to unequal benefit levels.

The ERA will provide a basis for extending the Supreme Court's analysis to certain insurance and pension programs not covered by this Title VII ruling. It will prohibit sex-based discrimination in insurance wherever governmental action is involved.[174]

Pension Protection for Homemakers

Since the full-time homemaker typically is unable to secure adequate income protection from pension plans or social security, she is particularly vulnerable if she becomes divorced. Upon divorce, a homemaker may discover that she is not entitled to any portion of the pension benefits in the wage-earner's name, even though the pension was purchased with marital income. The Employee Retirement Income Security Act (ERISA), the Federal law governing private pension plans, makes no provision for the protection of the divorced wife's rights.[175] Since pensions are often the major marital asset, the consequences are serious

Women married to government employees fare no better. In fact, denial of pension benefits to divorced wives is imposed by Federal law in some retirement programs. The United States Supreme Court recently rejected a wife's claim to a portion of her husband's railroad retirement benefits, holding that the Federal program precludes division of these retirement benefits as marital property, even if such division is required by a State's marital property law.[176]

A similar claim is now before the Court regarding Federal military retirement pay.[177] The United States Government has taken the position that military retirement benefits are not divisible,[178] thereby denying to military wives a share of the pension they helped to build. The net result of such restrictions is that, upon divorce, many women are accorded no rights to share in the fruits of their joint labor, although they have spent their married lives building families and working toward a secure retirement, but were unable to earn pension credits in their own name.

Here again, by providing an impetus for recognizing the value of homemaker services, ratification of the ERA will encourage legislative action in this area to protect women in divorce.[179] The ERA will strengthen the view of pensions as marital property to which the homemaker spouse made a nonfinancial but nonetheless valuable contribution.

How Will the Equal Rights Amendment Affect Opportunities for Females in the Nation's Schools?

Evidence abounds that our Nation's public schools in many instances do not offer equal opportunities to females and males as students or as employees.[180] The Equal Rights Amendment will require public-supported schools at all levels to

[173] It has been noted, for example, that since the insurance industry is left free to discriminate and may therefore charge higher rates to employers who hire a large percentage of women, 435 U.S. at 717–18, a burden is placed on employers that may serve to undermine equal employment opportunity requirements. See Merton C. Bernstein and Lois G. Williams, "Sex Discrimination in Pensions: *Manhart's* Holding v. *Manhart's* Dictum," *Columbia Law Review* (1978), vol. 78, p. 1241.

[174] Spirt v. Teachers Insurance and Annuity Association, 475 F. Supp. 1298 (S.D.N.Y. 1979). The exempted plans were regulated under the McCarran-Ferguson Act, which preserves the power of the States to regulate the insurance field except in instances where the Federal Government explicitly assumes control. 15 U.S.C.A. §§1011–1015 (1976).

[175] Under the Equal Rights Amendment, the concept of what constitutes government action in this area will be developed on a case-by-case basis. The insurance commissioner of Pennsylvania, relying in part upon the "strong policy of the State's ERA," has invalidated the use of sex-based actuarial data in computing auto insurance rates. In re Mattis v. Hartford Accident and Indemnity Company, Docket No. R78-7-2 (Apr. 17, 1980, unpublished). A similar claim challenging sex-based rates in disability insurance is now pending before Pennsylvania's insurance commissioner. See Starer v. Browne, Docket No. P80-8-11 (filed Aug. 14, 1980).

[176] 29 U.S.C. §1001–1381 (1976 and Supp. III 1979). See U.S., Department of Justice, *The Pension: American Pension System from the Viewpoint of the Average Woman*, p. 47 (1979). The divisibility of private pensions is a widely litigated issue. See, *e.g.*, Johnson v. Johnson, 5 F.L.R. 2045 (Ca. Ct. App. 1979); *cert. denied*, 48 U.S.L.W. 3452 (1980); General Dynamics Corp. v. Harris, 5 F.L.R. 2644 (Tx. Civ. App. 1979). See also Gill Ellen Bass, "Update: Division of ERISA Pensions and Other Benefit Plans, 6 F.L.R. 4001 (1979).

[177] Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979).

[178] McCarty v. McCarty, *rev. granted*, No. 80–5, 6 F.L.R. 2945 (October 21, 1980).

[179] Brief for certiorari for the United States as *Amicus Curiae* at 6, Cose v. Cose, No. 79–1469 (*pet. for cert. filed* Mar. 19, 1980).

[179] A recent reform measure amending the Foreign Service Act provides some rights to pension benefits for former spouses of Foreign Service personnel. Pub. L. No. 96–465, 94 Stat. 2079, 2102, 2113 (1980)(to be codified at 22 U.S.C. §4054). In addition, several similar measures, such as H.R. 2817 (Military Retirement Income Equity Act) and H.R. 2818 (Civil Service Retirement Income Equity Act), were introduced in the 96th Congress, but died without being passed.

[180] See generally President's Advisory Committee for Women, *Voices for Women* (Washington, D.C.: Government Printing Office, 1980) pp. 23–47; *1978 ERA Statement* pp. 14–16.

eliminate regulations and official practices that discriminate against females.[181] It will provide the constitutional basis for requiring public schools to eliminate the present effects of past purposeful discrimination. It will commit the country to the principle of equality so girls and boys can learn from the Constitution that they are considered equals before the law.

As students, boys and girls in public elementary and secondary schools continue to be steered into courses that reflect outmoded traditional stereotypes about a "man's world" and "women's work." Although this division is breaking down in the adult world, traditional ideas still survive regarding the suitability of school courses for boys and girls. Enrollment patterns of males and females in public vocational education continue to be overwhelmingly sex segregated.[182] In the city of Philadelphia, girls are precluded from attending an all-male public academic high school with superior science facilities.[183] Course materials used by students throughout the Nation reinforce the stereotypes about male and female roles.[184]

A number of Federal and State laws have been enacted to address gender-based inequities in educational institutions. Title IX of the Education Amendments of 1972 prohibits many forms of sex discrimination in federally funded schools.[185] The Federal Government also provides funds for affirmative efforts to encourage sex equity.[186] In several States as well, statutes expressly address the issue of educational equity,[187] or constitutional provisions may be relied upon to achieve sex equity in education.[188] But the extent of coverage varies widely. Title IX, for example, applies only to schools that accept Federal financial aid.[189] Its prohibition of sex-segregated admissions policies does not apply to public elementary or secondary schools,[190] and its prohibition of sex bias in athletics programs does not cover all sports.[191] Moreover, a Federal district court in Michigan recently held that Title IX did not extend to athletic teams that were not direct recipients of Federal financial assistance.[192] In some States—but not all—school admissions policies excluded from Title IX's nondiscrimination rule are subject to State laws prohibiting sex bias.[193] Few State and local educational agencies have funded programs to promote sex fairness.[194]

Where the provisions of Title IX do apply, serious implementation and enforcement problems limit the statute's effectiveness.[195] A school that refuses Federal dollars is not bound by Title IX's mandate for equality. Moreover, schools continue accepting Federal funds while not implementing the basic requirements of Title IX, encouraged by the weak record of Title IX enforcement.[196] The first set of regulations implementing Title IX was not promulgated until 1975, 3 years after the law was enacted.[197] Even then, schools were generously given until 1978 to come into compliance with the provisions concerning sex discrimination in athletics programs.[198] When many schools did not meet even this delayed compliance date, the Federal Government put a freeze on investigating complaints and promulgated a new policy interpretation at the end of 1979.[199] Investigation of a huge backlog of athletic com-

[181] *Senate ERA Report*, p. 17. The legislative history also makes clear that the ERA will *not* require that dormitories or bathrooms—in schools or anywhere else—be shared by men and women. Ibid.

[182] See Laurie Harrison and Peter Dahl, *Executive Summary of the Vocational Education Equity Study* (Palo Alto, Calif.: American Institutes for Research, 1979); American Civil Liberties Union Foundation of Georgia, Vocational Education Monitoring Project, *The Unfulfilled Promise of Vocational Education. A Look at Sex and Race Equity in Georgia* (1980).

[183] Vorchheimer v. School District of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd*, 430 U.S. 703(1977). See Andrea Novick and David Griffiths, "Sex Segregated Public Schools: Vorchheimer v. School District of Philadelphia and The Judicial Definition of Equal Education for Women," *Women's Rights Law Reporter* (1978), vol. 4, p. 79.

[184] See Lenore J. Weitzman, *Sex Role Socialization* (New York: Mayfield Publishing Co., 1975); U.S., Commission on Civil Rights, *Characters in Textbooks: A Review of the Literature* (1980).

[185] 20 U.S.C. §1681-86 (1976).

[186] See, *e.g.*, 20 U.S.C. §§1866, 2301-2380 (1976 & Supp. III 1979).

[187] *E.g.*, Wash. Rev. Code Ann. §28A.85.010-900 (Supp. 1980-81); Mich. Comp. Laws Ann. Sec. 37.2401 (1976); N.J. Stat. Ann. §18A:36-20 (1973).

[188] Mass. Const. pt. 1, art. 1; Pa. Const. art. 1, §28.

[189] 20 U.S.C. §1681 (1976).

[190] *Id.*, §1681(a)(1).

[191] 45 C.F.R. §86.41 (1979).

[192] Othen v. Ann Arbor School Board, 502 F. Supp. — (E.D. Mich. Feb. 23, 1981).

[193] *E.g.*, Conn. Gen. Stat. Ann. §§10-15 (1975); Mass. Gen. Laws Ann. ch. 76, §5 (1972); Wis. Stat. Ann. §118.13 (1977) (prohibiting single sex public schools).

[194] President's Advisory Committee on Women, *Voices for Women*, p. 29.

[195] U.S., Commission on Civil Rights, *Enforcing Title IX* (October 1980).

[196] Ibid., pp. 2-3.

[197] 45 C.F.R. Part 86 (1975). Regulations promulgated by the Department of Health, Education, and Welfare (HEW) became effective June 4, 1975. See also *Now Legal Defense and Education Fund, Project on Equal Education Rights, Stalled at The Start* (Washington, D.C.: 1977). Other agencies with enforcement responsibilities still had no regulations more than 6 years after Title IX became law. See National Advisory Council on Women's Educational Programs, *The Unenforced Law: Title IX Activity by Federal Agencies Other Than HEW* (1978).

[198] U.S., Commission on Civil Rights, *More Hurdles to Clear* (1980), p. 33.

[199] 44 Fed. Reg. 71413 (Dec. 11, 1979).

plaints has just recently begun—8 years after Title IX became law.[200] The enforcement record to date is hardly an inducement to compliance.

In the meantime, sex-biased education practices such as athletic programs that might have survived Title IX scrutiny because of the statute's loopholes and poor enforcement record have been invalidated by Federal and State courts relying on the 14th amendment[201] and State ERAs.[202] But not all States have their own constitutional equal rights provisions, and the 14th amendment cannot be viewed as the solution to loopholes and enforcement difficulties under Title IX or other Federal or State statutory schemes. In addressing a 14th amendment challenge to a public school's sex-biased admissions policy, one district court judge complained:

> A lower court faced with [the Supreme Court's post-1970s] line of gender discrimination cases has an uncomfortable feeling, somewhat similar to a [player at] a shell game who is not absolutely sure there is a pea.[203]

The ERA will give courts a firm handle for deciding constitutional challenges to sex bias in public schools. Although the ERA will apply only to educational institutions where governmental action is involved, it does not incorporate the narrow prerequisite of Federal funding to trigger its application nor does it incorporate the loopholes of the various State and Federal statutory schemes. Thus, for example, educational programs that involve State or local action would be subject to the equality mandate of the ERA. It will be more secure than statutes that are subject to amendment.[204]

How Will the Equal Rights Amendment Affect Women in the Military?

Under the proposed Equal Rights Amendment, women will be assured the equal treatment in the military currently denied by the Federal Government. This discrimination creates serious barriers to educational and employment opportunities for women, jeopardizes the women who must serve in dangerous military situations without the training and support essential to effectiveness and survival, and perpetuates harmful, archaic, and overbroad stereotypes about the capabilities of women and the role of men and women in society.

More than 150,000 American women serve in the armed forces today,[205] carrying on the proud tradition of women in the military, a tradition that includes more than 350,000 women who served in the Second World War,[206] 200,000 of them under hostile fire.[207] Yet these women, who have been shown to be as efficient and effective as their male counterparts,[208] have suffered serious discrimination in their jobs.

The vocational and specialist job training available to women in the military has traditionally been severely restricted,[209] and a variety of limitations placed on women's participation in the armed services reduces the number of jobs to which women may be assigned. In 1977, 73 percent of all authorized military slots were closed to women entirely.[210] Although justified by the armed services as necessary because women are prohibited from combat, fully 30 percent of these restrictions were not combat related.[211]

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[200] See "U.S. to Act on Complaints of Bias in College Sports," *New York Times*, p. A-20, Aug. 11, 1980.

[201] E.g., Leffel v. Wisconsin Interscholastic Athletic Ass'n., 444 F. Supp. 1117 (E.D. Wisc. 1978); Fortin v. Darlington Little League, 514 F.2d 344 (1st Cir. 1975).

[202] See *1978 ERA Statement*, pp. 28-29.

[203] Vorchheimer v. School District of Philadelphia, 400 F. Supp. 326, 340-41 (E.D. Pa. 1975), *rev'd* 532 F.2d 880 (3rd Cir. 1976), *aff'd*. 430 U.S. 703 (1977).

[204] Other civil rights laws, such as those affecting school desegregation, already have been weakened by amendments limiting enforcement that are attached to appropriations bills in order to circumvent usual legislative processes. See U.S., Commission on Civil Rights, *Civil Rights Update* (November 1980).

[205] Rostker v. Goldberg, Civ. No. 71-1480, slip op. at 30 (E.D. Pa. July 18, 1980), *stay granted*, —U.S.—, 101 S. Ct. 1 (July 19, 1980), *prob. juris. noted*, —U.S.—, 101 S. Ct. 563 (Dec. 1, 1980).

[206] U.S., Department of Defense, *Use of Women in the Military* (1977), p. 3 (hereafter cited as *Use of Women in the Military*).

[207] Although women serve in jobs such as nurses, truck drivers, radio operators, or technicians, which are classified as noncombatant, they have served and will continue to serve in combat environments. See Goodman, "Women, War and Equality: An Examination of Sex Discrimination in the Military," *Women's Rights Law Reporter* (1979), vol. 5, pp. 243, 259 (hereafter cited as "Women, War and Equality").

[208] One indication of their efficiency and effectiveness is the fact that women on active duty are being promoted at the same or higher rates than men. Overall retention rates for women are the same as men. *Use of Women in the Military*, pp. 7-8. The exercises tests conducted by the Department of Defense document that the field performance of men and women under normal conditions is equal. See U.S., Army Research Institute, *Women Content in Units Force Development Test* (MAX-WAC) I-23 (1977); *Women Content in the Army*, Reforger 77 (REF-WAC 77) I-4. (1978); "Women, War and Equality," pp. 256-57.

[209] Ibid., pp. 251-52.

[210] *Use of Women in the Military*, pp. 15-17. For example, "although only 6 percent of Army enlisted skills are closed to women, fully 42 percent of all *billets* filled by enlisted personnel in the Army are in specialities, skills, or units not available to women." [emphasis in original] U.S., Congress, Senate, S. Rep. No. 96-226, 96th Cong., 1st sess., 1979 p. 8.

[211] *Use of Women in the Military*, pp. 15-17; see "Women, War and Equality," pp. 251-52.

Discrimination in the military also results in the concentration of women in lower paying jobs.[212] Officer training programs are closed to women except in token numbers. Women in the military suffer discrimination in other ways as well. Some of the uniforms and equipment provided by the armed services for women fit so poorly "they constitute health and safety hazards and are inappropriate and nonfunctional."[213] Sexual harassment of female enlisted personnel is pandemic, encouraged by the discriminatory environment in the military that results from the gender-based regulations and restrictions.[214]

Access to the armed services is also restricted for women. Historically, women were limited by differential entrance requirements and by highly restrictive statutory quotas not solely related to combat requirements.[215] Despite the removal of some impediments,[216] women's enlistment is still limited by recruitment goals that operate as quotas.[217] Indeed, a Department of Defense study found there are more highly qualified women willing to enlist than are accepted now.[218] Because the military is the largest single vocational training institution in the Nation—offering on the job training at full pay and lifelong postservice benefits as well[219]—it has always been and continues to be an important route of upward mobility.[220] In addition, military pay for men and women is considerably higher than the average annual earnings of female high school graduates who work full-time year-round.[221] The women who are excluded are denied the practical and tangible benefits military service provides. The exclusion also denies the full citizenship and political rights historically intertwined with military service.[222] Thus, under the present system, women are seriously disadvantaged both in enlistment and once they are in the service.

The ERA will make illegal the gender bias that remains in the military, which currently limits opportunities for women and the contribution they can make to our Nation. It will require that the government allow men and women to be assigned and to serve on the basis of their skills and abilities and not on the basis of stereotypes and generalizations about their roles and capabilities.

The statutory prohibition against women serving on naval ships has already been invalidated under the equal protection component of the fifth amendment,[223] as has an all-male military draft registration plan.[224] In the draft registration case, *Rostker v. Goldberg*, which the United States Supreme Court has agreed to review,[225] the Government attempted to justify the exclusion of women by arguing that the presence of large numbers of women would hamper military flexibility in time of mobilization. Soundly rejecting this, the district court pointed to testimony by the Director of the Selective Service System and representatives of the Department of Defense that the inclusion of women in the pool of those eligible for induction would increase, not decrease, military flexibility.[226]

[212] *Use of Women in the Military*, p. 7.

[213] U.S., Department of Defense, Advisory Committee on Women in the Services, "Spring Meeting Minutes," Recommendation no. 4, Field and Organizational Clothing, Apr. 1-5, 1979 (unpublished).

[214] U.S., Department of Defense, Advisory Committee on Women in the Services, "Spring Meeting Minutes," statement of Donald S. Gray, "Department of Defense Policy and Position on Sexual Harrassment," Washington D.C., Apr. 21-25, 1980, pp. E-5 E-7 (unpublished); Hearing on Sexual Harrassment in the Military Before the Subcommittee on Military Personnel, House Armed Services Comm., 96th Cong., 2d sess. (Feb. 12, 1980).

[215] Women were restricted by statute to 2 percent of total enlistments in the armed forces until 1967. The Women's Armed Services Integration Act of 1948, Pub. L. No. 625, ch. 449, §102, 62 Stat. 357 (1948). Although this restriction was removed by Pub. L. No. 90-130, §1(9)(H), 81 Stat. 375 (1967), the representation of women in the armed services by 1985 is projected at only 12 percent. *Presidential Recommendations for Selective Service Reform: A Report to Congress Pursuant to Pub. L. No. 96-107* (Feb. 11, 1980), p. 42. See also *Use of Women in The Military*, p. 4; "Women, War, and Equality," p. 55.

[216] *Id.*, See also Pub. L. No. 93-290, §§1, 2, 88 Stat. 173 (May 24, 1974).

[217] U.S., Congress, Senate, *D.O.D. Fiscal Year 1982 Authorization Request—U.S. Army Total Manpower*, Hearing before the Manpower and Personnel Subcommittee of the Armed Services Committee, 97th Cong., 1st sess., Feb. 26, 1981, testimony of William Clark, Acting Assistant Secretary for Manpower and Reserve Affairs (unpublished transcript).

[218] *Use of Women in the Military*, p. iii. Kathleen Carpenter, "Women in The Military and The Impact of The Equal Rights Amendment," testimony before the Illinois House Judiciary Committee, Apr. 30, 1980 (unpublished), p. 6.

[219] These benefits include loans and scholarships for education, insurance, health care, dependent benefits, and veterans preferences in public employment. See, *e.g.*, 5 U.S.C. §§3309 (1976)(employment); 38 U.S.C. §§610-628 (1976 and Supp. 1979) (medical and dental care); 38 U.S.C. §1802 (1976) (home loans). See, generally, Personnel Administration of Mass. v. Feeney, 442 U.S. 256, 261 at nn. 6, 7 (1979); "Women, War and Equality"), pp., 244-45.

[220] Ibid., p. 244.

[221] *Use of Women in the Military*, p. 21.

[222] "Women, War and Equality," p. 246-48. In Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), the conclusion that blacks could not be citizens of the United States was supported in part by the fact that they were excluded from the U.S. and State militias. *Id.* at 705; see "Women, War and Equality," p. 247.

[223] Owens v. Brown, 455 F. Supp. 291 (D.D.C. 1978).

[224] Rostker v. Goldberg, slip op.

[225] *Id.*, 101 S. Ct. 563.

[226] *Id.*, slip op. at 38-39. The court also stated, "The record reveals that in almost any conceivable military crisis the armed forces could utilize skills now almost entirely concentrated in the female population of the nation." *Id.* at 39.

In view of the current standard for scrutinizing sex-based classifications under existing constitutional law,[227] the steadily expanding utilization of women in the military,[228] the recognition that women in the military enhance our national defense,[229] and the fact that Congress has the power today to draft women, it is likely that the issue of the all-male draft will soon become moot.[230] The U.S. Supreme Court could establish this if it affirms the district court's decision in *Rostker v. Goldberg* that an all-male registration plan is invalid under the Constitution's equal protection clause. In any event, however, the application of the ERA is clear: women may not be excluded from the pool of individuals eligible for a military draft solely on the basis of gender.[231]

But neither the equal protection clause nor the ERA will require that all women become soldiers. The legislative history of the amendment makes clear that "the ERA will not require that all women serve in the military any more than all men are now required to serve."[232] Congressional exemptions for women and men who are physically or mentally unqualified, and deferments for individuals because of family or other responsibilities, would apply to women just as they have always applied to men.

> Thus the fear that mothers will be conscripted from the children into the military service if the equal rights amendment is ratified is *totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory services.* For example, Congress might well exempt all parents of children under 18 from the draft. (emphasis added)[233]

With or without the ERA, women are sharing and will share with men the responsibility for military service. The determination of who will be called upon during wartime to bear the burden of military conscription and of actual combat duty will be made by Congress and the courts whether or not the ERA becomes a part of the Constitution. The ERA is needed to guarantee that women and men are accorded equal treatment and opportunity in the armed forces on the basis of their individual skills and abilities.

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[227] See *e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (to survive scrutiny, such classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives").

[228] U.S., Department of Defense, *America's Volunteers—A Report on The All-Volunteer Armed Services*, pp. 69–71 (1978) (hereafter cited as *Americas' Volunteers)*; Rostker v. Goldberg, slip op. at 33 n. 25.

[229] *America's Volunteers*, pp. 76, 182; Rostker v. Goldberg, slip op. at 41.

[230] See Carpenter, "Women in the Military."

[231] *Senate ERA Report*, p. 13.

[232] Ibid.

[233] Ibid.

2. How Will States Be Affected by Ratification of the Equal Rights Amendment?

The United States Constitution provides that powers not delegated to the Federal Government, or specifically prohibited to the States by the Constitution, are reserved to the States or the people.[234] This exclusive source of States' rights has meant historically that States have the power to legislate in a wide variety of areas, notably domestic relations, property, and criminal law.

The Equal Rights Amendment will not alter this basic constitutional structure. States will still be free to determine what their laws should say and how they should say it, with only one important exception. Just as other amendments prohibit States from discriminating on the basis of race, so under the ERA the States (and the Federal Government) will no longer be permitted to disadvantage individuals by means of any law, government policy, or government practice that discriminates on the basis of whether the individual is female or male.

This is no different from the interplay between other constitutional amendments and the power of the States. For example, the 15th amendment prohibits the denial of voting rights on the basis of race.[235] Nonetheless, States still have plenary power to determine the method and manner for voting, consistent with this nondiscrimination rule and legislation securing its enforcement[236] and with local needs and customs. So, too, the ERA does not change the substance of the State's power; it merely removes one possible basis of classification—gender—from an almost unlimited variety of available options.[237]

The ERA does not concern the private activities and personal lives of citizens. The issue is whether governments—Federal, State, and local—should have the right to discriminate against an individual solely because of his or her sex. Even with respect to sex-based classifications, the prohibition is not absolute where other constitutional rights, such as privacy[238] and religious freedom,[239] are concerned; or where the classification is narrowly drawn concerning physical characteristics unique to one sex;[240] or where it is necessary to remedy past discrimination to assure actual as well as theoretical equality.[241]

Section 2 of the ERA, which gives Congress the power to enforce the amendment by appropriate legislation, is worded almost identically to sections found in eight other amendments to the Constitution.[242] It gives Congress the authority to act under

[234] U.S. Const. amend. X.
[235] U.S. Const. amend. XV.
[236] Voting Rights Act of 1965, as amended, 42 U.S.C. 1973–1973p (1976 & Supp. III 1979).
[237] The range of classifications available in any given situation depends on the subject matter to be addressed by the law. For example, in the interest of promoting traffic safety, a State may classify on the basis of frequency of road use, past driving record, or condition of vehicle, but it may not impose limitations on drivers on the basis of whether they are female or male. In other words, "the law may make different rules for some people than for others on the basis of the activity they are engaged in or the function they perform." Brown and others, "The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women," pp. 871, 889.
[238] See, for example, *Senate ERA Report*, pp. 12, 17.
[239] Chicago Council of Lawyers, "Position Paper: The Equal Rights Amendment," pp. 9–11 (May 1980).
[240] *Senate ERA Report*, p. 12. The narrow "unique physical characteristics" exemption would permit, for example, laws that regulate sperm banks or provide programs for prenatal care. Brown, and others, "The Equal Rights Amendment," pp. 893–96. To survive ERA scrutiny, such laws must be narrowly drawn and serve compelling State interests. Ibid., p. 894.
[241] Ibid., pp. 904–5. See, also, Washington State Attorney General, *Legal Opinion No. 8* (Mar. 17, 1976).
[242] U.S., Const. amend. XIII, XIV, XV, XVIII, XIX, XXIII, XXIV, XXVI.

the ERA to change the hundreds of Federal laws and practices that discriminate against women.[243] States already have the power to act, consistent with the ERA's mandate; no special constitutional provision is required to assure this.

The ERA recognizes the authority of the States to act by providing a 2-year transition period after ratification during which States can rid their laws of gender bias without judicial involvement by State or Federal courts. The experience of State legislatures indisputably proves they are capable of enacting such change.[244] Some States have already successfully conformed their codes to the requirements of the amendment, either in anticipation of the Federal ERA or in accordance with a State equal rights provision.[245]

The 2-year transition period also provides the motivation and focus necessary to accomplish comprehensive reform. A Pennsylvania court commenting on the Pennsylvania State ERA noted that without it, "total modification of all gender-based provisions probably would have been a piecemeal and perhaps not completely successful accomplishment."[246] Because State legislatures are faced with so many pressing issues each session, without the ERA some States may never get around to effecting all the reforms necessary to ensure equality. After ratification, many States and the Federal Government will be engaged simultaneously in conformance activity, providing a large pool of resources and expertise to assist State legislatures. The ERA will also serve as "a general policy statement prohibiting future enactment of gender-based legislation."[247]

Under the ERA, States cannot decide *whether* to grant "equality of rights," but will have wide latitude in deciding *how* they will grant equality. Where open debate and broad-based participation is necessary to formulate and legitimize change, the legislature provides a good forum. Where a discriminatory law has its roots in common law or in judicial opinions, courts may be particularly equipped to make the necessary change.[248]

State legislatures are also free to choose the best revisions for statutes that conflict with the ERA. Discriminatory laws can either be invalidated entirely or extended to cover those previously not protected by the statute. A Senate report on the ERA stated: "It is expected that those laws which provide a meaningful protection would be expanded to include both men and women. . . ."[249] Consonant with this, the trend in Congress and in State ERA jurisdictions has been to enlarge the coverage of statutes that confer benefits.[250] For example, under Pennsylvania's ERA, a statute granting death benefits to the spouse of a deceased government employee was interpreted by the State's attorney general to entitle eligible widowers as well as widows to payment.[251] So too, Massachussetts' "homestead protection" right, previously available only to men, has been extended to women as part of the ERA implementation process.[252]

Where a law places a burden on one gender and not the other, that law can be invalidated.[253] Thus, in Pennsylvania, the prohibition against girls working as newspaper carriers was ended after the State attorney general concluded that this practice violated the State ERA.[254]

Under the ERA, States will continue to have authority in all areas where they have traditionally had it. The only power that States will lose is the power to discriminate against an individual on the basis of his or her sex. The legal reforms required by the ERA produce positive results for each State's citizens; unreasonable burdens in the law are eliminated while benefits are retained and extended.

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[243] See *Interim Report*; U.S., Commission on Civil Rights, *Sex Bias in the U.S. Code* (1977).

[244] See Brown and and others, "The Equal Rights Amendment," p. 910.

[245] See, *e.g.*, Brown and others, *Women's Rights and the Law*, pp. 37–40; Note, "State ERA's: Legislative Reform and Judicial Activism," *Women's Rights Law Reporter* (1978), vol. 4, pp. 227, 232.

[246] Murphy v. Harleysville Mutual Ins. Co., 422 A.2d. 1097, 1105, n.14 (Pa. Super. Ct. 1980).

[247] *Id.* at 1105.

[248] See., *e.g.*, Lundgren v. Whitney's, Inc., 614 P.2d 1272 (Wash. Sup. Ct. 1980) (court can change common law rule prohibiting wife from recovering for loss of husband's consortium); Kline v. Ansell, 414 A.2d 929 (Md. App. 1980) (common law gender-based action for criminal conversation held unconstitutional and no longer viable).

[249] *Senate ERA Report*, p. 15. See also Ruth Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," *Cleveland State Law Review* (1979), vol. 28, pp. 301, 316; Brown and Others, *Women's Rights and the Law*, p. 32.

[250] *1978 ERA Statement*, pp. 10, 15, 20–21, 24–29.

[251] Pennsylvania Attorney General, *Opinion No. 76–6* (Mar. 17, 1976).

[252] Mass. Gen. Laws Ann. ch. 188, §§1–9 (West 1976), *as amended by* St. 1977, c. 791, §§1–9 (West Supp. 1977).

[253] See *Senate ERA Report*, p. 15.

[254] Pennsylvania Attorney General, *Opinion No. 71* (1971).

3. How Will Courts Be Affected by Ratification of the Equal Rights Amendment?

The ERA will have a positive effect on the judicial system in two important ways. By stimulating legislative reform, it will help reduce the number of claims to be resolved in the courts.[255] Where compliance is not achieved through legislative reform, the amendment will give courts clearer guideposts than currently exist for deciding sex discrimination claims.

In the many States where gender bias in the law has not been eliminated through legislative reform, victims of this bias have been turning increasingly to the courts, relying on existing Federal and State constitutional provisions for redress. Unfortunately, most State constitutions do not expressly prohibit sex discrimination, and without the ERA, the Federal Constitution similarly fails to provide adequate or sure relief.

The 14th amendment to the U.S. Constitution, most frequently the basis for sex discrimination suits, offers uneven and uncertain protection against sex bias. The 14th amendment together with the 13th and 15th amendments were added to the Constitution more than a century ago to abolish slavery and extend civil rights to blacks[256] at a time when women were denied such basic prerogatives of citizenship as the right to vote, hold property, serve on juries, and practice certain occupations. The authors of the 14th amendment did not intend to change these rules.[257] The legislative history of the amendment's equal protection clause provides no guide for applying it to sex discrimination claims.[258]

The standard developed by the Supreme Court to judge such claims under the 14th amendment is unclear, both to the Court itself and to other Federal and State courts. Justice Brennan recently noted, "The standard of review. . .has been a subject of considerable debate."[259] In *Craig v. Boren,* Justice Rehnquist participated in this debate when he dissented from the majority's adoption of a "middle tier" standard of review for sex-based classification[260], stating that the standard:

> apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. . . .[T]he phrases used [in the standard] are so diaphanous and elastic as to invite

[255] Seven States (Alaska, Colorado, Maryland, Montana, New Mexico, Pennsylvania, and Washington) have effected comprehensive code reform to comply with their State ERAs, which has eliminated the need for many lawsuits. Note, "State Equal Rights Amendments: Legislative Reform and Judicial Activism," *Women's Rights Law Reporter* (1978), vol. 4, pp. 227, 232-33.

[256] William Van Alstyne, "The Proposed Twenty-Seventh Amendment: A Brief, Supportive Commentary," *Washington University Law Quarterly* (1979), p. 200, n. 26.

[257] Ruth Ginsburg, "Sex Equality and the Constitution," *Tulane Law Review* (1978), vol. 52, pp. 452-53.

[258] Ibid., p. 453.

[259] Rostker v. Goldberg, 101 S. Ct. at 3.

[260] Under the equal protection clause of the 14th amendment, laws that involve fundamental rights (such as voting or the right to travel) or suspect classifications (such as race or alienage) are subject to "strict judicial scrutiny." These laws are upheld only if the State can carry the heavy burden of demonstrating that the classification promotes a compelling State interest and is narrowly drawn. Few statutes have been upheld under this standard. All other equal protection claims, such as those involving economic regulations, survive constitutitional scrutiny upon the minimal showing of a governmental interest. Most statutes examined under this rational basis standard are upheld as appropriate governmental action.
Gender classifications are treated differently from the others. Sex has been given "quasi-suspect" status: to survive constitutional scrutiny under the equal protection clause, classifications based on sex "must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

> subjective judicial preferences or prejudices relating to particular types of legislation. . . .[261]

The equal protection analysis developed by the Court for gender discrimination claims is without precedent. The Court's creation of an exception to the standard for laws it divines are "compensatory" to women has only served to compound the confusion.[262]

Other courts have had considerable difficulty understanding and applying the Supreme Court's analysis of gender-bias claims under the 14th amendment.[263] Lower courts attempting to follow Supreme Court precedent have analyzed these issues incorrectly, necessitating additional litigation and reversal on appeal. For example, in *Wengler v. Druggists Mutual Insurance Company,* one State supreme court judge concluded there is "no identifiable 'supreme Law of the Land'. . .by which [lower courts] may adjudicate a claim of alleged gender based discrimination."[264] The Missouri Supreme Court in *Wengler* upheld a statute that provided automatic survivor's benefits to wives but not to husbands of workers who died in job-related accidents.[265] Citing Supreme Court decisions, the Missouri court reasoned that the challenged statute fit the "compensatory" exception—because it gave survivor's benefits to women, it was constitutionally permissible.

The Missiouri court, however, failed to address the discrimination women suffered as workers under the statute. In this case, Mrs. Wengler's labor was denigrated by the State because her survivors did not automatically receive the full array of benefits given to the survivors of similarly situated men. The State presumed her financial contribution to be less important to her family than that of a man. Recognizing this discrimination, and the discrimination against Mr. Wengler resulting from the denial of benefits to him, the Supreme Court of the United States reversed the State court's decision.[266]

In contrast to the uncertain and unsteady development of 14th amendment sex discrimination jurisprudence, courts called upon to interpret the ERA will have two major sources of guidance: the amendment's extensive legislative history and the experience of those States that have added equal rights provisions to their State constitutions.

After 49 years in Congress, the ERA was adopted with an ample legislative history specifically designed to guide the courts in their application of the amendment. Both the Senate and House of Representatives held hearings,[267] issued comprehensive committee reports,[268] and engaged in extensive floor debates[269] on the meaning and effect of the amendment.

Judges and legislators will also be able to look to precedents established by the courts in those States that already have enacted State ERAs similar to the proposed Federal amendment.[270] Some of these courts have had as much as 10 years' experience with the amendment. In formulating their opinions, State courts have closely adhered to the legislative history of the Federal amendment[271] and the opinions of other State ERA jurisdictions.[272] As this Commission has already reported, these opinions have greatly benefited both women and men.[273] This growing body of ERA jurisprudence will help guide courts in interpreting the Federal ERA.

Finally, the ERA will be construed in context with other rights guaranteed under the Constitution. Because rules of constitutional interpretation dictate that later amendments do not abrogate earlier provisions,[274] equal rights for women will have to be

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[261] *Id.* at 220-21. (Rehnquist, J., dissenting).

[262] In Kahn v. Shevin, 416 U.S. 351 (1974), the Court held that a Florida law that offered a $500 property tax exemption to widows but not to widowers did not violate the equal protection clause. The Court found that the law was designed to compensate women for the economic discrimination they had suffered historically. The Court has used this rationale to uphold two other gender-based laws. Schlesinger v. Ballard, 419 U.S. 498 (1975); Califano v. Webster, 430 U.S. 313 (1977).

[263] Even when the courts understand the standard, they often disagree with its validity. See Peters v. Narick, 270 S.E.2d 760, 764 (W. Va. Sup. Ct. 1980) ("We are unimpressed with the lineage of the middle-tier approach which. . .is largely the product of 'result-oriented' decisionmaking.").

[264] Wengler v. Druggists Mut. Ins. Co., 583 S.W.2d 162, 168 (Mo. Sup. Ct. 1979) (Donnelly, J., concurring) *rev'd.*, —U.S.—, 100 S. Ct. 1540 (1980).

[265] 583 S.W.2d 162 (1979).

[266] 100 S. Ct. 1540 (1980).

[267] U.S., Congress, Senate, Committee on the Judiciary, *Hearings on S.J. Res. 61 and S.J. Res. 231,* 91st. Cong., 2d sess. (1970); U.S. Congress, House, Committee on the Judiciary, *Hearings on H.J. Res. 35, 208 and Related Bills,* 92d Cong., 1st sess. (1971)

[268] U.S., Congress, Senate, Committee on the Judiciary, S. Rep. No. 92-689; 92d Cong., 2d sess. (1972); U.S., Congress, House, Committee on the Judiciary, Rep. No. 92-359, 92d Cong., 1st sess. (1971).

[269] *E.g.*, Senate debate: 118 *Cong. Rec.* pt. 7:9314-72 (1972); 118 *Cong. Rec.* pt. 8:9517-40, 9544-99 (1972); House debate: 117 *Cong. Rec.* pt. 27:35295-326 (1971); 117 *Cong. Rec.* pt. 27:35782-815 (1971). See generally Library of Congress, Congressional Research Service, *Equal Rights Amendment: Selected Floor Debate and Votes,* Dec. 21, 1974; The Equal Rights Amendment Project, The ERA: A Bibliographic Study (Conn.: Greenwood Press, 1976), pp. 3-32.

[270] See *1978 ERA Statement* pp. 23-24, notes 27-28, 30-32.

[271] See ibid., pp. 23-24; Darrin v. Gould, 85 Wn.2d 859, 540 P.2d 885, 889-90 (1975).

[272] See, e.g., Rand v. Rand, 374 A.2d 900 (1977).

[273] *1978 ERA Statement,* pp. 23-29.

[274] Townsend v. Edelman, 518 F.2d 116 (7th Cir. 1975).

balanced with other constitutional concerns, including freedom of religion and the right to privacy.[275] This means, for example, that the ERA will not require the ordination of women priests or the sex integration of religious services.

The ERA will be applied in accordance with settled principles of constitutional adjudication. For example, courts always avoid reaching the constitutional issue unless it is absolutely necessary to the resolution of the case.[276] Similarly, when a court finds that one part of a law violates the Constitution, it will invalidate only that part of the law; the court will not formulate a rule of constitutional law broader than that required by the precise facts.[277]

Thus, courts will adjudicate claims under the ERA within carefully defined parameters and, as described above, on the basis of many years of careful analysis of equal rights principles. Those who fear that courts will reach unpredictable decisions based on a judge's own inclinations and desires truly have the most compelling reason to seek ratification of the ERA as the best way to assure guidance for the judiciary when it is called upon to decide sex discrimination claims.

[275] The U.S. Supreme Court has stated that constitutional provisions must each be accorded equal dignity in their meaning. Ullman v. United States, 350 U.S. 422, 428–29 (1956).

[276] See Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154–55 (1950) (Frankfurter, J., concurring); Ashwander v. Tennessee Valley Authority, 297 U.S. 333, 347 (1934) (Brandeis, J., concurring).

[277] See Morris D. Forkosch, *Constitutional Law* (Mineola, N.Y.: Foundation Press, 1969), p. 72.

4. Summary and Conclusions

Three more States must act to ratify the proposed Federal Equal Rights Amendment by June 30, 1982, to secure this constitutional affirmation of equal rights for women and men. The U.S. Commission on Civil Rights issues this report and renews its call for ratification of the Equal Rights Amendment because of its conviction that the amendment is essential to assure equal justice for women and men under the law.

The Commission is concerned that the lack of a clear understanding of the effects of the amendment has confused some State legislators and the public alike about the ERA. We believe that this confusion stands as a significant barrier to ratification. There is broad-based support for the Equal Rights Amendment, demonstrated both by public opinion polls and the fact that 35 States—representing 72 percent of the population—have ratified it. However, an even larger majority expresses support for the principle of equal rights. The conflicting responses of those who state support for the principle of equal rights but are uncertain about—or opposed to—the ERA are difficult to reconcile, since the goal of equal rights can most effectively be secured by adding the Equal Rights Amendment to our Constitution. The Commission is certain that with better understanding of the need for and the positive effects to be achieved by the ERA, those who are truly committed to equal rights for women and men will conclude that the amendment should have their support.

The patchwork quilt of laws in the Nation is cluttered at all levels of government with provisions that sanction discrimination against individuals on the basis of their sex, such as the following:

- State and Federal laws that limit employment opportunities for women and operate to deprive women of certain jobs. Although of dubious validity today, such laws remain in the Federal code and on the books in such States as Arkansas, Missouri, Mississippi, and Ohio and may be tacitly enforced.
- Loopholes in antidiscrimination laws, such as those provisions in Arizona, Illinois, and South Carolina laws and in Federal employment laws that exempt elected officials from the prohibitions against discrimination. Such exemptions leave women who are public employees particularly vulnerable to job bias.
- State laws that define different rights for husbands and wives during marriage with respect to each other, to their children, to their property, and to third parties.
- Laws and practices that operate to deprive homemakers of economic security during marriage, upon divorce, or at widowhood by failing to recognize their valuable contribution to their families and society.
- Social security provisions premised on sex-based assumptions that fail to recognize the value of work in the home, the discriminatory wage structure in the labor force, and the diversity of roles played by women today.
- Pension provisions that perpetuate discrimination in retirement, disadvantaging older women who are retired employees.
- Governmental action that denies male and female children and youth equal educational opportunities and pigeonholes them into sex-segregated roles.

• Laws and practices that discriminate against women who serve the Nation in the military.

In some States and at the Federal level, legislatures have begun action to remove sex bias from the law. Although all levels of government are now free to promote equal rights, this piecemeal process for reform is simply not adequate to the task; it is lengthy at best, producing inconsistent results. Some States have barely acted at all, and in others, the action has been uneven and could be reversed. And regardless of State laws, women and men in all States may be victims of Federal laws that continue to sanction discrimination. Equal rights for women has been on the back burner at all levels of government, and it is likely to remain there until the Constitution speaks clearly and directly to the issue. For the present, no matter where we live, women and men throughout America continue to be disadvantaged by laws and governmental action that classify individuals on the basis of sex and deny equal rights under the law.

Ratification of the ERA will securely establish the principle of equal rights for women and men in all States. It will set a standard of equal dignity before the law that clearly tells government it may not intrude upon our lives by imposing rights and obligations upon one sex that are different from those imposed upon the other sex. In doing this, the ERA limits the power of government in only one important way: it will deny Federal, State, and local governments the power to discriminate against its citizens on the basis of whether they are female or male.

The 2-year transition period following ratification of the ERA assures that each level of government can implement this standard as its legislature determines is best. By stimulating legislative reform—and moving it to the "front burner" during a nationwide implementation process—the ERA will help reduce the number of sex discrimination claims to be resolved in the courts. Moreover, where it becomes necessary to turn to the courts because a legislature has failed to act, judges called upon to decide sex discrimination claims will have guideposts under the ERA that are sorely lacking today. The courts will be guided by the extensive legislative history of the Equal Rights Amendment and the experience of States that have already added equal rights provisions to their State constitutions.

Through legislative implementation and, where necessary, the judicial process, the amendment's guarantee of "equal rights under law" will bring beneficial changes in the following ways:

• Laws and regulations that presently restrict opportunities available to women throughout the labor force would clearly be invalid. Ratification will place upon legislatures the obligation to repeal provisions that limit the jobs women can hold.

• Loopholes would be closed in existing State and Federal antidiscrimination laws, thereby strengthening the right of public employees—including those who work for elected officials—to be free from sex-based employment discrimination.

• Laws and policies that deny women equal rights to marital property would be invalid. The ERA will strengthen the equal rights of married women to ownership, possession, and management of marital property.

• A constitutional basis would be established for recognizing the homemaker's contribution to a marriage. The recognition of marriage as an economic as well as social and emotional partnership is essential for homemakers to gain meaningful economic security during and after marriage.

• The economic position of women facing retirement would be improved by invalidating sex-based discrimination in insurance, pensions, and retirement security programs that involve governmental action.

• Government-supported schools at all levels would be required to eliminate policies and practices that discriminate against individuals on the basis of whether they are female or male.

• The military would be required to eliminate discriminatory policies and practices that presently limit opportunities for women and the contribution they can make to the Nation.

On the basis of its study of the Equal Rights Amendment, the Commission on Civil Rights firmly believes that ratification of the amendment is essential to achieve equal rights for women and men. The Commission hopes that this report, together with the *Statement on the Equal Rights Amendment* it issued in 1978, will help the Nation to understand and support this conclusion. The fundamental guarantee of equal rights under law embodied in the Equal Rights Amendment belongs in our Federal Constitution. The women and men of this country deserve no less than this secure, constitutional guarantee of equal dignity under the law.

Statement of U.S. Commission on Civil Rights on the Equal Rights Amendment

JUNE 73

During the legislative sessions of 1973 and 1974, the legislatures of many states will have before them one of the most important constitutional changes of our time—the proposed 27th Amendment.

The Amendment assures that "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."

For 16 years, the Commission on Civil Rights has been combatting the pernicious and pervasive racial discrimination which continues to divide our nation. In 1972, under Public Law 92-496, the Commission's jurisdiction was extended to cover discrimination on the basis of sex. Sex discrimination has been an integral part of the laws, customs, and official practices of the United States throughout its history. The Commission believes that the Equal Rights Amendment will provide a needed constitutional guarantee of full citizenship for women, and will assure the rights of both women and men to equal treatment under the laws. Ratification of the ERA is an important and appropriate means of alleviating sex discrimination—just as the adoption of the 13th and 14th Amendments was vital to the cause of racial equality.

The Equal Rights Amendment passed the 92nd Congress by an overwhelming margin. Within 48 hours after that historic occasion, six states had ratified the new Amendment. Within three months, the total had grown to 20 states. Thirty states have now approved the Amendment, and several states have also passed state equal rights amendments.

The Amendment must be adopted by 38 of the 50 states, and this must occur within seven years. Even after the Amendment is ratified by the remaining required states, it will not go into effect for two years. Ratification of the 27th Amendment is an essential step toward meeting this nation's stated goal of equal opportunity for every citizen. The Commission hopes and trusts that the Equal Rights Amendment soon will have the approval of a sufficient number of state legislatures to become an operating part of our Constitution.

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan Agency established by Congress in 1957 and directed to:

Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, or national origin;

Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin;

Appraise Federal laws and policies with respect to the equal protection of the laws because of race, color, religion, sex, or national origin;

Serve as a national clearinghouse for information in respect to denials of equal protection of the laws because of race, color, religion, sex, or national origin; and

Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission

Stephen Horn, *Vice Chairman*
Frankie M. Freeman
Maurice B. Mitchell
Robert S. Rankin
Manuel Ruiz, Jr.
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